Immigration and Asylum Appeals – a Fresh Look

A report by JUSTICE

Chair of the Committee
Sir Ross Cranston

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The views expressed in this report should not be taken as reflecting the views of the organisations or institutions to which Working Party members belong. The Working Party divided into four sub-groups and also met in plenary session. The contents of the report and the recommendations reflect a collective view and members should not be regarded as being bound by each and every part. We were greatly assisted by the participation of those from Government departments but they had no formal role in approving the recommendations.

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EXECUTIVE SUMMARY

The UK immigration and asylum appeals system faces considerable challenges. A high percentage of successful appeals against Home Office decisions, instances of poor-quality and exploitative representation and the recent removal of appeal rights put pressure on a system that is already complex and subject to frequent change. The system suffers further from widely reported inefficiencies and a culture of non-compliance. This leads to high volumes of cases in the appeals system and lengthy delays. In an arena where appellants are often highly vulnerable and many cases involve fundamental and non-derogable rights, the consequences of decisions for individuals can be significant.

Recognising the HMCTS Reform Programme as a welcome opportunity for reform, the Working Party considered how the system of immigration and asylum appeals might better fulfil its purpose of making lawful, timely and just decisions.

This report therefore traces each stage of the immigration and asylum appeals process in order to identify difficulties and recommend practical change. In particular, we consider:

- *Home Office refusal decisions*, finding that better Home Office decision-making – and getting it right first time - is the key to delivering a better appellate system;

- *The application process for immigration and asylum appeals*, paying detailed attention to the move to online processes and highlighting the issue of unsupervised, unqualified and poor quality representatives purporting to provide advice and assistance to appellants;

- *Appeals against adverse decisions of the Home Office on immigration and asylum matters in the First-tier Tribunal (Immigration and Asylum Chamber),* considering the important role of tribunal case workers and judicial case management to improve tribunal efficiency;

- *Hearings in the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber)*, focussing in particular on video-conferencing and video-hearings, recognising the potential advantages of these models while stressing the fundamental principles that should govern any expansion in their use and where they will not be appropriate;

- *Appeals to the Upper Tribunal (Immigration and Asylum Chamber), Judicial Review applications and appeals the Court of Appeal,* focusing on the multiple stages of permission to appeal. We consider the tension between the important right of review in this jurisdiction and the pressure on the system that flows from too many appellate stages. We do not recommend removing rights of appeal. However, we suggest ways to streamline this process.

Better communication between the parties emerges as the key theme of the report, and we consider how this might be facilitated both at the pre-hearing stage and on a continuing, informal basis.

Beyond this overarching theme, the report makes 48 recommendations spanning the various stages of the appeals process. These seek to provide a framework for better quality decision-making, more effective case management and a reduction in the number of unnecessary appeals – to the benefit of all participants in the system and the administration of justice more generally.

I. INTRODUCTION

1.1 The UK immigration and asylum appeals system is complex, difficult to navigate and subject to relatively frequent changes. Many and lengthy appeal stages, high allowed appeal rates against Home Office decisions and in recent times the removal of appeal rights have placed the tribunal and court system under considerable pressure. The consequences for individuals of decisions in this area can be significant; all asylum and international protection cases involve fundamental and non-derogable rights. Users of the system can be amongst the most vulnerable, sometimes with multiple vulnerabilities. At the same time, despite the excellent work of the majority of legal practitioners in this area, the system faces many claims lacking legal merit. Because there are a number of stages, those refused at one stage can claim at another stage.

1.2 The problems facing the system of immigration and asylum appeals are not new, from the fact that many appeals might be avoided (as suggested by the high percentage of allowed appeals), through issues with the availability and quality of legal representation, to inefficiencies at the hearing stage.[1]

The HMCTS reform programme

1.3 An ambitious programme of reform aiming to modernise the entire justice system was first outlined in the Government's 2016 White Paper.[2] The digitisation and modernisation of courts and tribunals involves substantial investment. It aims to modernise and streamline the justice system by making increased use of decisions "on the papers", caseworkers, virtual hearings, innovative technology and resolving cases out of court.[3] The Working Party was established to examine the immigration and asylum appeals system against the background of the HMCTS Reform Programme ("The Reform Programme").

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[1] See R. Thomas, "Immigration appeals and delays: One the verge of a crisis?", *The UK Administrative Justice Institute*, 18 May 2017; J. Hyde, "Immigration appeal delays 'shocking' as backlog reaches 63,000", *Law Gazette*, 22 December 2016.

[2] Lord Chancellor, Lord Chief Justice and Senior President of Tribunals, *Transforming our justice system*, (2016), p. 4.

[3] *Ibid*.

1.4 The White Paper acknowledged that tribunals are an "essential component of the rule of law"; their hallmark being the delivery of fair, specialist and innovative justice. In this report, we refer to "The Immigration and Asylum Chambers", which consist of the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber). The First-tier Tribunal (Immigration and Asylum Chamber) is an independent tribunal which deals with appeals against decisions made by the Home Office in immigration, asylum and nationality matters. The Upper Tribunal (Immigration and Asylum Chamber) is a superior court of record dealing with appeals against decisions made by the First-tier Tribunal (Immigration and Asylum Chamber) and most judicial reviews of Home Office decisions about immigration and asylum matters.

1.5 The Reform Programme envisages that tribunals, including the Immigration and Asylum Chambers, will be "digital by default", with fewer physical hearings. There are to be:

> *[E]asy to use and intuitive online processes put in place to help people lodge a claim more easily, but with the right levels of help in place for anyone who needs it, making sure that nobody is denied justice. Once a claim is made, automatic sharing of digital documents with relevant government departments will mean that the tribunals and the parties will have all the right information to allow them to deal with claims promptly and effectively, saving time for both tribunal panels and claimants.*[4]

1.6 Digital reforms of the Immigration and Asylum Chambers are also expected to include the ability for appellants to track the progress and status of their appeal online, at any time. Research by HMCTS has suggested that appellants can disengage because of a lack of knowledge of the process, subsequently missing deadlines or not attending hearings, leading to adjournments and further delays.[5] Allowing users to track their appeals online will also enable them to stay "better informed of the progress of their appeal".[6] We consider that the ability to track

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[4] Ministry of Justice, *Transforming Our Justice System: Summary of Reforms and Consultation*, Cm 9321 (HMSO, 2016), section 5.1.ii.

[5] R. Marchant, "Sometimes it makes sense to start in the middle", *Inside HMCTS Blog*, 3 February 2017.

[6] R. Thomas and J. Tomlinson, *The Digitisation of Tribunals: What we know and what we need to know* (Public Law Project, 2018), p. 22.

the progress of a case online, as a result of the Reform Programme, will be a great improvement and is an excellent feature of the Reform Programme which we strongly endorse. Parties will also be able to submit evidence digitally and take advantage of the convenience of having and being able to navigate electronic bundles. Confusion about appeal bundles, as we shall see, is a significant factor affecting efficiency in this jurisdiction. Processes that can ensure that parties have complete, accurate and similar bundles at the hearing are to be welcomed.[7]

1.7 As the Working Party sees it, the Reform Programme presents opportunities to address some of the problems in the immigration and asylum appeals system, since there is the risk that existing inefficient processes will become entrenched in the move towards automation and digitisation. We acknowledge that the Reform Programme does not address all of the important problems that the Immigration and Asylum Chambers face. For example, there is the pressure on legal aid lawyers with the reduction in in the real value of legal aid rates. Another example is the recruitment and morale of the tribunal judiciary, which we were told has been adversely affected by factors such as the reduction in their real pay over the last decade, and a feeling among many that the challenges and complexity of their work is unappreciated.[8] We have therefore looked at broader reform than the Reform Programme.

Our approach

1.8 In this report we trace the stages of the immigration and asylum appeals process from the point of making an application to the Home Office through to making a permission application to the Court of Appeal. Our focus is on the process of appealing against or making an application for judicial review of a Home Office decision on immigration or asylum. That has ruled out consideration of a whole range of matters including, immigration policy, tribunal and court fees, and appeal rights in immigration matters.[9] What we have tried to do is to take a

[7] E. Petty, "Designing a public law service to meet user needs", *Inside HMCTS Blog*, 7 February 2018.

[8] See Justice Working Party Report, *Delivering Justice in an age of austerity* (JUSTICE, 2015); M. Fouzder, "Shortage of judges hits immigration tribunals", *Law Gazette,* 20 February 2017.

[9] For more on these issues, see for example the House of Commons Home Affairs Committee's report *Immigration Policy: basis for building consensus*, Second Report of Session 2017–19 HC 500 (2018); Bail for Immigration Detainees, *Mind the Gap: Immigration Advice for Detainees in Prisons* (2017).

holistic view of the process – from Home Office refusal decisions, through statutory appeals and judicial review process to the right of appeal to the Court of Appeal. We have sought to review the existing processes of the Immigration and Asylum Chambers for all users.

1.9 Our overall aim has been to make recommendations to improve the quality of decision-making; the standard of legal assistance and judicial case management; to reduce the number of unnecessary appeals; and to ensure that digital services are accompanied by commensurate safeguards. We seek to make recommendations to achieve these aims. A list of our recommendations is set out in the concluding chapter. The organisations and individuals that have assisted us in understanding the complexities of this area are acknowledged in the final chapter.

1.10 We are grateful to HMCTS, the Ministry of Justice, the Home Office and the judiciary for their assistance and participation during the course of our work. While we have not spoken extensively with individuals in the immigration and asylum system, we have made every effort to consider their experiences through conversations with those representing their views or providing support services.

Key theme

1.11 Better communication between the parties associating with the system of immigration and asylum appeals emerges as a key theme of this report. We take the view that improvements in judicial (and Home Office) processes may be brought about through the type of informal, non-attributable discussions - at regional and national level – along the lines we had in the Working Party. The Administrative Justice and Tribunals Council recommended that a key factor in government departments getting more decisions right first time was to have effective feedback mechanisms to ensure that the outcomes of appeals and complaints were understood throughout the organisation.[10]

1.12 The Home Office records the main reasons for successful appeals and analyses the resulting patterns and trends, whilst also specifically reviewing judgments which are explicitly critical of its conduct in particular cases. There are also HMCTS immigration and asylum stakeholder meetings at which the Home Office, judiciary and other stakeholders are present (though the public nature

[10] Administrative Justice and Tribunals Council, *Right First Time* (2011).

of those meetings may limit the opportunity for open and frank discussion about problems and potential solutions).[11]

1.13 In our view more is needed. One approach would be for the resident judges at each of the First-tier Tribunal (Immigration and Asylum Chamber) hearing centres to convene and chair regular meetings to discuss issues related to processes. These meetings would involve the Immigration Law Practitioners' Association (ILPA) and other individuals or organisations representing appellants' legal representatives and representatives from HMCTS, the Law Society, the Bar Council and the Home Office. The President of the First-tier Tribunal (Immigration and Asylum Chamber) would then convene bi-annual meetings of the judicial chairs of these meetings, together with ILPA, those from other organisations whose members provide legal advice and assistance, and the Home Office. Such forums would serve to foster a mutually respectful relationship between all stakeholders.

[11] For more on these meetings, see Senior President of Tribunals' Annual Report 2017, p. 30.

II. HOME OFFICE REFUSAL DECISIONS

Introduction

2.1 In this chapter we examine Home Office decision-making on immigration and asylum applications.[12] We start with some background on the application process and whether a person can appeal a decision which refuses their application or can seek some other remedy such as administrative review or judicial review. We then turn to Home Office decision-making on immigration and asylum matters, in particular its implications for the Immigration and Asylum Chambers. Better Home Office decision-making is the key to delivering a better appellate system: it is a trite point but the more decisions made correctly by the Home Office at the outset, the fewer cases the tribunal system will likely have to deal with. Finally, we describe the recent Home Office "minded to refuse" letter pilot, which encourages applicants to place all relevant material before the decision-maker before the final decision is made, to avoid the current position where often it is only just before or at a tribunal hearing that these are produced.

The application process

2.2 The process for making an asylum claim differs from that where a person is making an immigration claim.[13] Whether there is the right of appeal differs as well, as well as across different types of immigration claims.

2.3 An application for *asylum* is either made at the port of entry on arrival or by attending the asylum screening unit in Croydon or one of the regional offices (except for those in detention). Applications for asylum are generally considered by a dedicated unit within the Home Office whether made at port or at the asylum screening unit. The individual will normally be interviewed in detail as

[12] The term "asylum" is used to include each of the various types of international protection, i.e. refugee status and international protection.

[13] Asylum cases are those that fall within the ambit of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (the "Refugee Convention"). Humanitarian protection cases are those that fall outside the Refugee Convention but there are substantial grounds for believing that the person concerned, if returned to the country of origin, would face a real risk of suffering serious harm: Immigration Rules, Rule 339C.

to the reasons for their application (the Home Office does not generally interview very young children aged 12 or under). Applicants will also be given a short period of time within which to make written representations following the interview. In the case of unaccompanied asylum-seeking children, they are required to complete a detailed statement of evidence form prior to the interview. This practice used to be applied to adults, but the present procedure does not require it, although it is certainly the practice of many claimants (and their representatives) to do so.

2.4 There are a number of procedural guarantees in respect of the application provided for under the EU Asylum Procedures Directive 2013/32/EU ("The Procedures Directive"). These include guarantees to ensure that individuals are provided with information about the process for claiming asylum in a language which they would be able to understand; the opportunity to have an interpreter present at an interview; and the opportunity to take legal advice, including the availability of legal aid in appropriate cases. These provisions under The Procedures Directive are reflected within the Immigration Rules.

2.5 Applications that are *immigration* based may be made from overseas (such as in entry clearance cases) or may be made from within the UK, either in respect of those who have valid leave and who wish to extend their residence or from those who have no leave, including those who have arrived without leave to enter. It is generally a requirement that an application for leave to remain on non-asylum/humanitarian protection grounds is made on a specified application form. For those seeking entry clearance and some in-country applications, the application form is available online. While there is no requirement to use a specific form in nationality applications, most applicants usually complete either a paper or online form, which is then sent to UK Visas and Immigration.

Refusal and appeal rights

2.6 Where an individual receives a refusal of their application, they will be informed either that they have a right of appeal that is exercisable prior to removal (where the claim relates to asylum, subject to exceptions); that they have a right of appeal from outside the UK (where the claim has been certified as "clearly unfounded" under section 94 of the Nationality, Immigration and Asylum Act 2002, or where the claim relates to an entry clearance application); that they have a right of administrative review (in some immigration related decisions where the review is to another official within the Home Office, rather than the tribunal service); or that they have neither a right of appeal, nor a right

of administrative review (see below). In the latter case, individuals are not always informed of the possibility of applying for judicial review, but that may be the only remedy open to them.

2.7 Following the implementation of the Immigration Act 2014 (in stages from October 2014 to 6 April 2015), most immigration applicants no longer have a full right of appeal. The only immigration decisions that attract a right of appeal are: refusals of human rights or protection claims and revocations of protection status (part 5 of the Nationality, Immigration and Asylum Act 2002); refusal to issue an EEA family permit as well as certain other EEA decisions (regulations 36 - 39 of the Immigration (European Economic Area) Regulations 2016); and deprivation of citizenship (section 40A of the British Nationality Act 1981).

2.8 For some immigration claims, such as standard visitor visa or a short-term study visa, the only option, if refused, is to re-apply and to pay another fee.

2.9 For most other categories, claimants who have been refused may apply instead for "Administrative Review".[14] Although this is a review of the original decision, it is made by a different Home Office official.[15] However, new evidence and documents are generally not considered because this process is described as an opportunity to correct "case working errors", not for supplying further or better evidence.[16] Refused applicants with further or better evidence have to reapply, but only if eligible.

2.10 In cases where there is a full right of appeal, including in asylum and humanitarian protection cases, once an application has been refused and an appeal is lodged in the First-tier Tribunal (Immigration and Asylum Chamber), the Home Office does not currently examine cases again until shortly before the appeal hearing. An appellant is under an ongoing duty to report to the Home

[14] For a list of claims eligible for Administrative Review, see: Immigration Rules, Appendix AR: administrative review, AR3.2, AR 4.2, AR 5.2.

[15] Independent Chief Inspector of Borders and Immigration, *An inspection of the Administrative Review processes introduced following the 2014 Immigration Act, September — December 2015* (HMSO, 2016), sections 2.1 and 2.2.

[16] Immigration Rules, Appendix AR: administrative review, AR2.4.

Office new or additional reasons for why he or she should stay in the UK or not be removed.[17]

2.11 Where a right of appeal is available prior to removal, the individual will normally receive appeal forms from the Home Office at the time of the refusal decision, enabling them to file an appeal to the First-tier Tribunal (Immigration and Asylum Chamber). Where a refusal decision is made, enabling an appeal to be pursued outside of the UK, the individual will also be informed of this, but reminded that such appeal will only be available after departure.

2.12 The refusal decision will also normally inform the individual of the opportunity to take advice on the negative decision. An individual seeking to challenge a negative decision may seek advice from a lawyer regulated by a professional body or an adviser registered with the Office of the Immigration Services Commissioner ("OISC").

Applications and appeals in practice

2.13 The Home Office makes millions of immigration and asylum decisions a year. Of these, only a small minority attract a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) (i.e. are refused and have a right of appeal).

2.14 The reduction in statutory appeal rights brought about by the Immigration Act 2014 is likely to be a major contribution to the recent decrease in the number of appeals received by the First-tier Tribunal (Immigration and Asylum Chamber).[18] The other side of the coin to the removal of appeal rights is the marked increase in the volume of immigration judicial reviews, despite the availability of administrative review by the Home Office. In 2015-16 there were over 18,000 applications for permission to apply for judicial review against

[17] Nationality, Immigration and Asylum Act 2002, s. 120 (as amended by the Immigration Act 2014). This restricts what can be considered by the First-Tier Tribunal Judge as under s. 85(6) of the 2002 Act, the Tribunal can only consider any new matter not so reported if the Home Office gives permission.

[18] In April to June 2017, First-tier Tribunal Immigration and Asylum Chamber receipts more than halved (to 7,800) compared to the same period in 2016.

immigration and asylum decisions.[19] This compares with some 1,800 non-immigration judicial reviews in 2016, a figure that has remained relatively stable over the years.[20] The increase over the years in the volume of immigration judicial reviews in the Upper Tribunal (Immigration and Asylum Chamber) and High Court led, inevitably, to an increase in the volume of applications to the Court of Appeal for permission to appeal.

Home Office decision-making

An overview of Home Office decision-making

2.15 There is no shortage of criticism of Home Office decision-making in immigration and asylum matters. Home Office decision-making was not the main focus of the Working Party's work, which was on the appeal process, although we have already made the obvious point that there would likely be fewer challenges in the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber) if Home Office decision-making was right first time.

2.16 The Working Party notes with concern that at the time of this report, some 50 percent of Home Office decisions were not upheld on appeal in the First-tier Tribunal (Immigration and Asylum Chamber).[21] Over time the success rate has fluctuated: 48 percent in 2010/2011; 39 percent in 2015/16.[22] In asylum, the success rate historically hovered around the 25 percent mark (2007-2014), but

[19] The figures above are drawn from databases which do not cover the same periods: Ministry of Justice, Civil justice statistics quarterly: July to September 2017 tables, Table 2.1 and 2.4 for the Administrative Court (2,486 in 2016, with 55 transferred to the Upper Tribunal) and Ministry of Justice, Tribunals and gender recognition certificate statistics quarterly – July to September 2017, Main Tables (July to September 2017) Table UIA.1, for the Upper Tribunal (15,727 in 2015/16).

[20] Ministry of Justice, Civil justice statistics quarterly: July to September 2017 tables, Table 2.4.

[21] Ministry of Justice, Tribunals and gender recognition statistics quarterly: October to December 2017, Main Tables (October to December 2017), Table FIA.3 Q3 2017/18.

[22] Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly: April to June 2016, Main Tables (April to June 2016) extrapolated from Table FIA.3.

rose to 35 percent in 2015 and 40 percent in 2016/17.[23] Moreover, the total average time taken across all appeal categories in the First-tier Tribunal (Immigration and Asylum Chamber) has increased to 50 weeks, an increase of 2 weeks from the same period in 2016.[24]

2.17 The success rate on appeals is a crude measure of the quality of Home Office decision-making. It must be seen against the huge volume overall of decisions made. It is also the case that not all refusals result in an appeal, and even where an appeal right is granted it can be quicker for an applicant to re-apply successfully rather than proceed with a lengthy appeal, especially in entry clearance cases. Moreover, decisions are overturned on appeal not only for the poor quality of decision-making. Evidence presented by the appellant at the appeal hearing is often not available to the decision-maker. Moreover, in the exercise of its judgment the tribunal may take a different view of the same evidence. Where the decision has a discretionary character there is always scope for arriving at different conclusions, both reasonable. The Home Office identifies these as the main reasons for appeals being allowed and characterizes only a relatively small fraction of allowed appeals as being attributable to casework error. From its own analysis, the Home Office has identified a range of other factors including: i) new evidence being supplied at the appeal that was not available to the original decision maker; ii) a change in circumstances due to the passage of time; iii) a change in case law between the decision and the appeal; and iv) variability of judicial decision making.

2.18 Nonetheless the Independent Chief Inspector of Borders and Immigration has pointed to flaws in Home Office decision-making. In 2015, he concluded of asylum decision making that the "quality of interviewing and decision-making needed to improve, along with the recording of the reasons for decision."[25] The

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[23] Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly: October to December 2017, Main Tables (October to December 2017), extrapolated from Table FIA.3; Home Office Immigration Statistics, Asylum data tables, April to June 2017 Volume 4, Table as_14.

[24] Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly: October to December 2017, main Tables (October to December 2017), Table T.2.

[25] Independent Chief Inspector of Borders and Immigration, *An Inspection of Asylum Casework: February 2016* (HMSO, 2016), p. 2. See also J. Pettit, *Proving Torture* (Freedom from Torture, 2016), which found that even when medico-legal reports are submitted at the pre-decision stage "existing policy guidance is not being followed and that expert medico-legal reports are poorly handled by caseworkers", Introduction.

inspector's 2017 report concluded that the Home Office "struggles to keep on top of the volume of claims it receives."[26] Further, new decision-makers told the inspector that they had not felt adequately prepared following their initial training and had relied on support from more experienced colleagues and "on the job" learning.[27] Twenty-four percent of the decisions sampled for 2016/17 from the Home Office's own internal quality assurance process were found to be below "satisfactory".[28]

"Right first time"

2.19 It is in everyone's interests if the Home Office gets decisions "right first time". In particular, better Home Office decision-making is important to the appellate system. The more the Home Office correctly makes and explains decisions at the outset, or is able effectively to review decisions in light of new evidence, the greater the proportion of applicants not having to appeal or seek judicial review, resulting in fewer cases the appellate system will have to handle and increased public confidence in the Home Office.

2.20 The Home Office has taken various steps over the years to improve first-instance decision-making.[29] One measure was the 2010-2012 "Early Legal Advice Pilot". The idea was to test whether "front-loading" legal advice and allowing for longer timescales (with a doubling of the 30 day target) would reduce the number of successful asylum appeals, ultimately saving the Home Office resources on asylum support. It was thought that early legal advice would mean that applicants would provide more evidence and argument in support of their claim in the early stages.

2.21 The pilot was largely unsuccessful. Although more cases were granted discretionary leave, there was no change in the grant rate for asylum or humanitarian protection, no statistically significant impact on the percentage

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[26] Independent Chief Inspector of Borders and Immigration, *An Inspection of Asylum Casework: April – August 2017* (HMSO, 2017), p. 2.

[27] Independent Chief Inspector of Borders and Immigration, *An Inspection of Asylum Casework: February 2016* (HMSO, 2016), p. 25.

[28] *Ibid*, p. 27.

[29] See, for example, its joint work with UNHCR on Quality Initiative and the Quality Integration Project and its work with Still Human Still Here on improving initial decision-making.

of refusals being taken to appeal, no statistically significant impact on the percentage of cases allowed at appeal, and no discernible impact on decision and interview quality, other than in complex cases. Moreover, the Home Office found that the financial cost of providing the additional advice and of resulting delays in determining cases outweighed the financial benefits.[30]

2.22 A more recent and very specific measure has been taken to improve the conduct of asylum interviews, particularly in relation to female claimants. In 2015, the Home Office undertook to meet a request by a female asylum claimant for an interviewer and interpreter of a particular gender, wherever possible.[31] The Independent Chief Inspector's report concluded, however, that female asylum claimants do not understand the potential importance of having this option until much later in the process and cited concerns that interviewers did not explain the importance.[32] The Home Office is currently piloting the automatic allocation of female interviewers and interpreters to female asylum claimants, unless claimants do not want this. The Working Party welcomes this pilot to ensure that female asylum claimants feel comfortable in interview and able to disclose matters as far as possible.[33]

2.23 The Home Office has made various attempts to triage cases on receipt but these have generally failed. The problem is that with the exception of certain case types, limited documentation is submitted at that point. Thus the resources expended on this work have not led to sufficient benefits to be considered value for money. There was confirmation of the late submission of material in a recent decision in the Court of Appeal, where Underhill LJ said: "[T]he Appellant may well have a good case for leave to remain outside the [Immigration] Rules, but

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[30] M. Lane, D. Murray, R. Lakshman, C. Devine and A. Zurawan *Evaluation of the Early Legal Advice Project*: *Final Report*, (The Home Office, 2013). For further analysis of the ELAP pilot and an examination of its limitations, see B. Anderson and S. Conlan, *Providing Protection - Access to early legal advice for asylum seekers*, (Irish Refugee Council, Asylum Aid, Epim, Compas and Inimoiguste Keskus Human Rights Centre, 2014) Chapter 3.

[31] See Home Office, Gender issues in the asylum claim, Version 3.0, March 2018; Home Office, Asylum Policy Instruction: Asylum Interviews, Version 6.0, March 2015, para. 3.7.

[32] The Independent Chief Inspector of Borders and Immigration, *An Inspection of Asylum Casework: April – August 2017* (HMSO, 2017), p. 33-34.

[33] *Ibid,* Chapter 9.

she did not in her application give the Secretary of State the material with which to make an informed judgment."[34]

2.24 At a later stage of the process, the Home Office told us that a major problem it would face in reviewing a decision before an appeal hearing is that evidence is often provided by legal representatives at the very last opportunity (and frequently later than the 5 working days that the Tribunal directions provide for).[35] Evidence is frequently submitted by appellants as late as the day before the hearing, even where cases have taken months to reach that stage, which is in contravention of the Practice Direction.[36] No formal management information has been collected on this but in the Home Office's internal analysis of a small sample of 700 appeals for which e-feedback was completed in a seven week period during March to May 2017, less than a third of appellants complied with the requirement to file their evidence 5 days before the hearing. Around 25 percent served their evidence on the day or the day before the hearing, and around 30 percent did so 2 to 5 days before the hearing.

2.25 From the viewpoint of appellants, there may be problems in obtaining the evidence. Immigration and asylum appeals are now averaging 50 weeks (26 weeks in asylum/protection appeals, 125 weeks in appeals against decisions of Entry Clearance Officers). Asylum appeals are now being listed more quickly than previously, and more quickly than immigration appeals.[37] This may not allow sufficient time to acquire expert evidence to meet the reasons given for the refusal of the initial claim. This may be especially the case if Legal Aid Agency funding is required, and when expenses on experts may not have been justified prior to refusal and so could not have been available at the time of the initial claim. Moreover, expert evidence cannot be commissioned too far in advance of an appeal, because of the risk that it may be out of date.

2.26 The Working Party considers that the online appeals system introduced by the Reform Programme should prompt appellants to upload all relevant evidence with their appeal, where available, at the time the appeal is lodged. The system

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[34] *Parveen v The Secretary of State for the Home Department* [2018] EWCA Civ 932, para. 29.

[35] Revised Practice Direction Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal, Part 4, para. 7.5 (b).

[36] *Ibid.*

[37] *Ibid*.

should indicate what evidence will be relevant and prompt appellants to upload that evidence. However, we accept that this is unlikely to alter the Home Office's decision in most cases currently being appealed since a large number of appeals turn on new evidence submitted after the Home Office's original decision and prepared in response to the "reasons for refusal letter".

2.27 The Home Office's "Next Generation Casework" project consists of a number of pilots which aim to improve the quality of decision-making. These include assisted letter writing; conducting asylum interviews via video link; summary notes of interviews rather than full transcripts; feedback from the Home Office Presenting Officer to the initial decision maker; and minded to refuse letters.

Minded to refuse letters

2.28 As we have already noted, there is a lack of understanding on the part of many users of the immigration and asylum appeals process. The Home Office informs us that the frequent late submission of evidence by legal representatives has caused it to operate a "just in time" system whereby presenting officers prepare cases only twenty-four to forty-eight hours in advance.[38] This system is tailored to "bad" representatives; those failing to submit evidence until the day of the hearing. The Home Office is exploring options for earlier triage and whether this is possible in the current system.

2.29 First introduced in 1989, a minded to refuse letter is a written statement, provided by the Home Office, giving the reasons that a claim is likely to be refused. This gave appellants an opportunity to respond with relevant information or evidence before the decision was made. The practice emerged after the case of *Thirukumar,*[39] which required the Home Office to give asylum seekers written reasons for refusal even though, at the time, many asylum claimants had no in-country right of appeal.[40] The letters were discontinued

[38] Management information derived from a sample of cases provided by the Home Office suggests that, in EEA appeals for example, approximately a quarter of decisions are over-turned on appeal due to new evidence that was not available to the original decision-maker. Similar numbers were shown in a sample of Asylum claims.

[39] *R v Secretary of State for the Home Department ex p. Thirukumar and Others* [1990] 3 All ER 652.

[40] Those who applied at port and once in the country unlawfully had no in-country right of appeal.

following the Asylum and Immigration Appeals Act 1993, which for the first time gave all asylum seekers an in-country right of appeal.

2.30 As part of its renewed focus on improving the quality of decision-making, the Home Office is running a minded to refuse pilot in Cardiff at the time of this report. For funding reasons, the pilot has been limited to 100 randomly chosen asylum refusal decisions. In this "proof of concept" project, as with the original minded to refuse letters, the Home Office will send letters to applicants giving their preliminary view on a case, and offering the applicant the opportunity to respond with relevant information and/or evidence. Though the Home Office has stated that it does not wish to build significant additional delay into the system, the project allows for some additional time to respond to such letters.

2.31 A similar practice, albeit in the appeal context, is the First Tier Tribunal's Rule 23 procedure.[41] Rule 23 requires the Home Office to state within 28 days of receipt from the Tribunal of the notice of appeal whether it opposes the issue of an EEA Family Permit, and if so, why. This also applies to entry clearance cases, which attracted a right of appeal at the time when the current Rules were drafted in 2014.[42]

2.32 The Working Party very much welcomes the minded to refuse initiative. We consider that the success of the scheme will depend on whether claimants or their legal representatives are able to make representations in sufficient time, with evidence where relevant. In this respect the Working Party considers that the minded to refuse pilot must consider both the claimant's and the legal representative's needs. From the claimant's viewpoint, effective compliance assumes that the asylum claimant is sufficiently familiar with the English language and the legal process, and can access the required resources to respond by the relevant deadline. Effective compliance by legal representatives assumes that they are in a position to supply the evidence by the relevant deadline, especially when expert evidence may be required. The effectiveness of the Cardiff pilot may be hampered by restrictions on Legal Aid Agency funding, as representatives may not be able to fulfil the requirements of the minded to refuse letter.

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[41] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Procedure Rules 2014, rule 23.

[42] Entry clearance cases which are human rights claims still attract a right of appeal.

2.33 The Working Party considers that minded to refuse letters should be drafted clearly so as to indicate what they are and what exactly appellants and/or their legal representatives need to prove (or supply in the way of evidence) for the Home Office to grant the application. Even if an appeal occurs, this should assist by focusing any subsequent appeal bundle supplied by the appellant and/or their legal representatives and help narrow the issues on appeal. Furthermore, letters drafted in this way will make it easier for the tribunal (or the appellant) to identify instances of poor legal representation (e.g., where it is clear what is needed to win the appeal but the legal representative has failed to act accordingly). It goes without saying that responses to minded to refuse letters must be considered conscientiously and open-mindedly by the Home Office decision-maker.

2.34 One specific issue associated with minded to refuse letters in the context of asylum is the ability to obtain legal aid for medical reports. Applications for funding from the Legal Aid Agency for expert Medico-Legal Reports at the pre-decision stage may fall to be refused, if they were seen as pre-empting a negative decision by the Home Office. While recommending changes to the availability of legal aid is outside of the remit of this report, we suggest that such an approach is likely to hamper the effectiveness of the minded to refuse pilot. The Working Party considers that minded to refuse letters should explain that Legal Aid Agency funding may be available in some cases at the pre-decision stage for Medico Legal Reports from specified organisations (i.e. the Medical Foundation and the Helen Bamber Foundation).

2.35 While we welcome the Home Office trialling this initiative in asylum applications, we suggest that the process might work better in immigration claims where evidence is typically more ready to hand and the involvement of the Legal Aid Agency may not be required. If it is an immigration claim where there is no statutory right of appeal, it is all the more important that the decision is correct.

2.36 As well as indicating clearly what is needed for the Home Office to give a positive decision, the Working Party considers that minded to refuse letters should be written in plain English with a translation available into the applicant's native language; be extremely clear that this is not the final decision, e.g., this should be indicated in bold font near the top; include a notice on obtaining legal advice and/or support to respond to the letter and list how this can be obtained; and give appellants and their legal representatives sufficient time to respond.[43]

[43] For more on the importance of using comprehensible language, see JUSTICE Working Party, *Preventing Digital Exclusion from Online Justice* (JUSTICE, 2018), Chapter 3, paras. 3.34 – 3.35,

III. THE APPEAL PROCESS

Introduction

3.1 This chapter addresses three aspects of the legal process when a person seeks to challenge a decision of the Home Office on an immigration or asylum matter. First, we discuss the process of appealing an immigration or asylum decision to the Immigration and Asylum Chambers. The transformation in how this is occurring with the Reform Programme and the move to online processes is given special attention. Secondly, the chapter discusses the need for better communication between on the one hand the parties and on the other the Home Office once legal proceedings are launched. We conclude that better communication would avoid a number of appeals. Thirdly, we examine the serious issue of incompetent and dishonest advisers who purport to give advice and assistance to those with immigration and asylum claims.

3.2 The context of our discussion is firstly, appeals to the First-tier Tribunal (Immigration and Asylum Chamber). Secondly, there are the onward appeals to the Upper Tribunal (Immigration and Asylum Chamber) from the First-tier Tribunal (Immigration and Asylum Chamber), applications for permission to apply for judicial review in the Upper Tribunal (Immigration and Asylum Chamber), and applications for permission to appeal from the Upper Tribunal (Immigration and Asylum Chamber) in both these instances to the Court of Appeal. We return to the details of the latter proceedings in Chapter 6.

Making an appeal

3.3 We begin with an outline of the process if a person is to appeal an asylum or immigration Home Office decision to the First-tier Tribunal (Immigration and Asylum Chamber). As far as immigration decisions are concerned, since the Immigration Act 2014, those attracting a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) are refusals of human rights or protection claims and revocation of protection status (part 5 of the Nationality, Immigration and Asylum Act 2002), and refusals to issue an EEA family permit, as well as certain other EEA decisions (regulation 26 of the Immigration (European Economic Area) Regulations 2006) and deprivation of citizenship appeals.

3.4 An appellant challenging a Home Office decision commences an appeal by completing an application form (which can be downloaded from the Gov.UK website) and submitted to the First-tier Tribunal (Immigration and Asylum

Chamber) or by lodging an appeal online. Subject to certain exceptions (where the individual is legally aided, in receipt of asylum support or supported by local authority), a fee is payable on the lodging of an appeal notice. A fee is payable for each appellant. A lower fee is payable in respect of appeals to be determined on the papers, rather than at an appeal involving a hearing.

3.5 Where the appeal is being pursued in the UK, the time period for bringing an appeal is 14 days from the decision. Where the appeal is being pursued outside the UK the time period is 28 days from the receipt of the decision. Where an appeal involves an individual removed from the UK, with the appeal exercisable only overseas, the 28 day period runs from the date of departure.

3.6 The appeal form requires that the individual provide details of the refusal decision, the contact details (if relevant) of a representative, and the grounds upon which an appeal is being pursued. In most cases the grounds of appeal can be quite short in order to trigger a right of appeal. Where an appeal is being brought outside the time limit provided for under the rules, an application should be made requesting an extension of time and a decision will be made by the tribunal as to whether or not to extend time.

3.7 The Home Office, as respondent to the appeal, receives a notice of the lodging of the appeal from the tribunal, rather than from an appellant. The Home Office is required to prepare a bundle for the purposes of the appeal whether the appeal relates to an entry clearance decision or otherwise. This will usually be the first stage of any communication between the Home Office and the appellant. As we pointed out in **Chapter 2** this sometimes represents the only communication between the Home Office and the tribunal until the hearing itself, unless the court has directed a preliminary hearing or case management review hearing. The appellant is usually served with directions requiring preparation of a statement and a bundle of any documents upon which they will rely.

3.8 Making an application can present a number of difficulties, for the unrepresented in particular. Persons may be unaware of how to access adequate legal advice and representation. The first language of many users may not be English and so they may have difficulties with literacy and answering questions in the forms. Incomplete forms are frequently submitted to the tribunal. Preparing and submitting evidence with complex legal and factual issues, and preparation of the necessary bundles, can also be time-consuming and costly. The Reform Programme is to be welcomed in providing the opportunity for overcoming some of these problems.

Applying to the Tribunals in the future

3.9 Many of the features of the Reform Programme were first tested and applied in the Social Security and Child Support Tribunal, which aims at 'digital by default' leading to 'an end-to-end digital process'.[44] With the Reform Programme, HMCTS envisages an iterative process of "continuous online hearings", including features such as giving appellants the ability to track the progress of their case online, as well as digital evidence and document-sharing with the relevant government department.

3.10 It remains to be determined how (and whether) to apply these features in the Immigration and Asylum Chambers. Some will have obvious benefits. For instance, where evidence is submitted online in the Immigration and Asylum Chambers, the case could be dealt with more speedily and the appeal resolved without having to resort to a hearing (e.g. where DNA evidence is required to prove that the appellant is the child or parent of the sponsor). Other features may prove more problematic. In general the Working Party considers that HMCTS should proceed with caution, if it does not already intend to do so, testing each advance thoroughly, introducing each change incrementally, in so far as possible, and carefully monitoring outcomes before proceeding to introduce the next change.

3.11 It is apparent that the Immigration and Asylum Chambers have become relatively complex and slow in parts of their operation, and overburdened by paper and unnecessary bureaucracy. We welcome the Reform Programme in seeking to:

- provide an online portal enabling users to access tribunal services digitally. The online portal will contain information and guidance on users' rights, online forms and the ability to pay fees. A digital case file will be created once a user has started a case, which will enable users to interact with the tribunal at their convenience and submit further evidence online;
- enable early engagement between the parties via the digital case management system in order to narrow down the issues in dispute and ensure that all relevant evidence has been shared;
- enable tribunal case workers to assist better with case progression and decision-making;

[44] Sir Ernest Ryder, 'The Case for Online Courts', University College London, 16 February 2017.

- resolve more disputes without the need for an oral hearing;
- reduce hearing length and adjournments, improve judicial efficiency and the throughput of appeals by ensuring that where a hearing is required, the parties will be focused on the issue in dispute and will have seen all of the evidence beforehand; and
- reduce unnecessary delays by shifting to digital services and automating straightforward tribunal processes.

3.12 However, we are concerned about the ability of a considerable number of people to engage effectively with digital services - litigants in person; the illiterate and those with an inadequate knowledge of the English language; those unfamiliar with or lacking access to IT; the vulnerable (in the widest sense, see **Chapter 4**); and minors. In our view HMCTS should design the online Immigration and Asylum Chambers system to accommodate the needs of the most vulnerable litigant in person. It should engage in extensive stakeholder consultation to better understand the needs of vulnerable users of the Immigration and Asylum Chambers.

Assisted digital

3.13 To make sure that online services are accessible by everyone, a complementary 'assisted digital' service (or services) is envisaged, primarily to assist litigants in person and unrepresented appellants. This is to be provided through a variety of channels, including phone and webchat, via the HMCTS Courts and Tribunal Service Centre, with face-to-face support provision delivered through a contract with Good Things Foundation, a digital inclusion charity.

3.14 JUSTICE's recently published Working Party Report, *Preventing Digital Exclusion from Online Justice,* makes recommendations on preventing digital exclusion from the justice system and to ensure that technology enhances rather than hinders access to justice.[45] It identifies some groups at high risk of exclusion, and much of what that Working Party recommends is relevant to reform in the Immigration and Asylum Chambers. Among its recommendations, which we endorse, are that:

- HMCTS should conduct more research (including qualitative research) about how people behave in an online environment and on choices between various "Assisted Digital" channels.

[45] JUSTICE Working Party Report, *Preventing Digital Exclusion from Online Justice*, *supra*.

- HMCTS should collect and make available the widest range of data possible to support research by external experts.

- Assisted Digital services should be tested in regions where internet access is still limited and support services may be difficult to access

- Specific attention should be paid to solutions for highly excluded groups, like homeless people and detainees.

- Greater investment should be made in "trusted faces" in "trusted places", i.e. services already providing digital support and internet access.

- HMCTS should design the Online Court, and other online justice services, with an independent "look and feel" to reflect the constitutional independence of the courts.

- HMCTS should maximise the benefits of the "multi-channel" approach, e.g. helping people move with ease between digital access, phone assistance, face-to-face assistance and paper.

- Online justice services should cater for the most affordable and ubiquitous mode of digital interaction: mobile technology.

- HMCTS should conduct end to end pilots of online justice services, learning from hearing and enforcement stages what is required at earlier stages.

3.15 This Working Party commends HMCTS for its research to understand users' particular concerns when interacting with Immigration and Asylum Chambers' services.[46] Charities and advice agencies often have a valuable insight into the needs of the users of the Immigration and Asylum Chambers. For example, Migrant Help, the charity which runs Asylum Help, has built up expertise in using telephone lines as a way to support asylum seekers. We recommend that the experience of charities and agencies which offer support services to asylum seekers and migrants be drawn upon extensively in the development of assisted digital services.

[46] As JUSTICE's response to the *Transforming justice* consultation pointed out, applicants for whom English is a second language are disadvantaged "culturally …technologically, linguistically and legally". (See JUSTICE, *Response to Consultation on Transforming our Justice System* (2016).

3.16 There are short timescales involved in appeals (e.g. 14 calendar days to appeal a decision of the Home Office; seven calendar days to submit an appeal against a decision of the First-tier Tribunal (Immigration and Asylum Chamber)). Litigants in person should be in a position to obtain the assistance that they need within those timeframes. The reality is that appellants may only contact the Assisted Digital service towards the end of a deadline. For instance, they may have tried, but been unable, to complete the process online, or due to a lack of understanding of the process and/or of the English language they may not have understood the urgency. Under a paper based system, an appellant is able to return their form out of time but must provide reasons for the delay and seek permission for the late filing.

3.17 HMCTS has informed us that it recognises this problem and that it will provide information to service users at the start of the process, including details on what they need to submit for an appeal and details of how to access Assisted Digital support, including timeframes for appointments. Currently the Online Centres which are contracted to provide support are obliged to fulfil an appointment within 10 working days of the request being made by the Courts and Tribunals Service Centre. Emergency appointments have also been contractually agreed, to take place as soon as possible following a request from the Courts and Tribunals Service Centre, and no later than three working days after the request is made. HMCTS will also accept walk-in appointments at the Online Centres for Assisted Digital help. HMCTS should put contingencies in place to ensure that an appellant who is unable to comply with a deadline because of the additional delay of having to use Assisted Digital services is not disadvantaged.

3.18 We recommend that HMCTS works with the Tribunal Presidents to develop guidance for judges dealing with applications for an extension of time where delay has been caused by the time taken to get assistance in submitting the appeal online. For example, it would assist in an application for an extension of time for the date(s) when the appellant first contacted the service for assistance to be recorded and automatically included.

Completing appeals online

3.19 As part of HMCTS' plans to make tribunals digital by default, the First-tier Tribunal (Immigration and Asylum Chamber) has already introduced new digital and paper appeal forms in select jurisdictions. New forms will be simplified, with functionality to improve the information provided, and make it easier for appellants to understand the detail required. Forms will be

accompanied by improved guidance, which will be built into the forms where possible, to better support unrepresented appellants through the process.

3.20 It is vital that appellants, particularly litigants in person, understand the consequences of the information they supply and choices they make online for the outcome of their claim. The online system presents opportunities to explain to appellants and to provide supporting guidance in completing forms. However, it is not HMCTS' task to provide legal advice. Online forms will have better structure, flags and warnings which make sure essential information is provided. Pop-up help boxes will provide information on how to complete the form. The Social Security and Child Support Tribunal, Divorce, Civil Money Claims and Probate Online have all tested variations of this approach, and HMCTS reports that their use has been successful, with most now released for general public use. We welcome HMCTS' plans for online guidance, including live chat and pop-up explanation boxes to maximise the user-friendliness of digital services.

3.21 Users of the Immigration and Asylum Chambers may not understand the limitations of an agency providing them with assistance to access the digital system. It would not be unusual for an appellant to expect the Assisted Digital service to act for them in a legal capacity and/or for any such agencies to be part of a coherent and unified system whereby information given to one agency of the system (e.g. an agency providing assisted digital support) is relayed to the relevant branch (e.g. to the Home Office and/or the Immigration and Asylum Chambers). It is vital that users of Assisted Digital understand its purpose and limitations, and that HMCTS services manage their expectations accordingly. The Working Party considers that all frontline staff providing Assisted Digital services should be given training to understand how important it is to explain the limitations of the service at the very outset.[47]

3.22 JUSTICE's Working Party report *Preventing Digital Exclusion* recommends that HMCTS "develop methods of signposting users from its services to existing sources of independent, authoritative legal information and advice such as the Citizens' Advice website and Advice Now." We endorse this recommendation and consider that Assisted Digital services should be contracted to signpost to organisations that can provide legal or practical advice or services as appropriate.

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[47] See JUSTICE Working Party, *Preventing Digital Exclusion from Online Justice*, *supra*, p. 16, footnote 51.

3.23 We recommend that any online interface should contain the facility for materials (including forms and guidance) to be electronically translated into the main languages of Tribunal users by using approved software. Materials should be re-translatable into English for appellants' representatives.

3.24 We recognise that those in detention or in National Asylum Support Service accommodation have particular needs and will require computer facilities, access and support to be able to engage with the online system. We recommend the provision of appropriate IT facilities in detention and in, or near, National Asylum Support Service accommodation.[48]

3.25 It is vital that the rights of appellants are protected whilst "digital by default" is being implemented in the Immigration and Asylum Chambers. We recommend that various safety nets be introduced to deal with system errors: appellants should be required to acknowledge online receipt of notices of hearings; receive confirmation of any completed steps by email or text (e.g. when submitting an appeal, uploading documents or acknowledging receipt of a notice of hearing) with instructions to contact the Immigration and Asylum Chambers if no such confirmation is received; and a record of such confirmations be kept that is accessible to the Tribunals in the event of any dispute.[49]

3.26 Putting appeals online will require the Home Office to digitise so that application forms, decisions, etc. are already in electronic form and do not have to be scanned and uploaded to the appeals system. The advantages are obvious. UK Visas and Immigration (UKVI) has launched an Assisted Digital support service for some visa applications.[50] The services offered include: telephone support from a Migrant Help UK advisor to complete online application forms; face to face support at some libraries to access and complete online forms; and face to face support at home from a "We Are Digital" tutor to complete online application forms. We welcome UKVI providing such support and recommend that the service be extended to those applying for entry clearance from abroad.

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[48] *Ibid,* pp. 2.31-2.42.

[49] *Ibid*, pp. 3.14, 3.15, 3.17, and recommendation 11 (the multi-channel approach).

[50] For more, see Gov.uk, Guidance: Assisted Digital, UK Visas and Immigration; and Gov.uk, Home Office Digital, Data and Technology Blog.

3.27 The Working Party considered the position of those appealing from abroad, for example, those with human rights and protection claims certified under section 94 and section 94B of the Nationality, Immigration and Asylum Act 2002.[51] The Supreme Court's decision in *Kiarie and Byndloss* reflects concerns around the obstacles to pursuing appeals fairly and effectively from abroad.[52] The Reform Programme is not currently planning to implement face to face support outside of the UK, but the Immigration and Asylum Chambers service project will consider the specific needs of overseas users of the tribunal and how it can best meet those needs. Paper channels will remain in place for those who have no access to technology or support in using it.

3.28 We recommend that HMCTS' Assisted Digital services be extended to out-of-country appellants in so far as possible, and that, at the very least, free telephone assistance be provided for those appealing online from abroad. HMCTS should also consider extending scanning and Assisted Digital services to these appellants (see "Document upload" below). We endorse HMCTS' approach in relation to the continued availability of paper channels. We recommend that appellants be informed that online appeals and telephone support cannot be guaranteed as safe in protection-related cases and that they be assisted to use paper channels instead.

Monitoring outcomes

3.29 In our view, HMCTS should collect data on outcomes of digital and non-digital appeals to monitor relative disadvantage (see *Preventing Digital Exclusion* report, recommendation 3). It should identify and consult on what might be relevant statistical data, for example, appellants/representatives failing to attend hearings, adjournment rate and reasons for adjournments, appellants failing to produce relevant documents in advance of the hearing, appellants failing to produce original documents at the hearing, late submission of documents, and the proportion of unrepresented appellants.

3.30 If there are differences in outcomes, and digital appeals are less favourable for appellants, this should be explained at the outset and an alternative (non-digital)

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[51] See Home Office, Certification of protection and human rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims), Version 3.0, April 2017.

[52] *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42.

appeal option should be offered. In individual cases, judges should have the discretion to direct in-person hearings whenever they consider appropriate.

Document upload

3.31 At present, appeals can be submitted to the Immigration and Asylum Chambers by hand, by post, by fax or through the existing online portal. A hard copy of any evidence must be submitted to the Immigration and Asylum Chambers and cannot currently be submitted online. Preparing and photocopying appeal bundles can be costly, since appeal bundles can be necessarily lengthy. To improve accessibility and inclusivity, we welcome HMCTS' plans to provide a cost-free bulk scanning and printing service to enable those who are unable, or unwilling to engage digitally with HMCTS, to continue to transact and communicate using paper.

3.32 Digital bundles will provide greater transparency: it will be easier to see what is in a bundle, and perhaps more importantly, what documentation is missing. We recommend that the HMCTS website be clear as to who has the responsibility of uploading the document. We recommend that the onus be on the Home Office to upload any documents that the appellant has already provided to them. This is to protect litigants in person who may not understand the need to provide copies of the same documents to the Tribunal. Although digital bundles have the potential to improve the speed and transparency of the process, an unstructured approach could lead to more documents being submitted because of the ease of uploading and sending documents digitally. We recommend that document upload be structured in a way which ensures that bundles are presented in an orderly and focussed manner.

Cyber-security

3.33 We note that online systems can be impersonal. Appellants may need reassurance that the information they are giving via the online system is going to the right place and will not be read by inappropriate individuals. Appellants may feel uncomfortable with the lack of intimacy within the online space and be concerned that their information is potentially available to a wider group than strictly necessary. This may be particularly problematic in respect of the disclosure of personal information such as in cases involving gender-based violence or sexual abuse.

3.34 HMCTS assures us that precautions will be taken to ensure that personal and sensitive data is appropriately and securely stored. This assurance will be

communicated to individuals using the service. If individuals feel uncomfortable they will have the option of using the Assisted Digital services or a paper application, and the bulk scanning and printing service. We recommend that the choice given to appellants to go down the paper route is explained to appellants at the outset and reassurance given that any information submitted online will be treated in the strictest confidence.

3.35 There are significant cyber-security implications in asylum and protection cases in so far as disclosure that someone is claiming persecution by a particular State can put them at risk of harm on return to that State (and could lead to their protection claim succeeding whereas previously it might not have). This risk was demonstrated in a 2016 case in which the court ordered the Home Office to pay substantial damages for the misuse of private information and breaches of the Data Protection Act 1998 following the online publication of a spreadsheet listing families returned to their country of origin.[53]

3.36 HMCTS informs us that security industry best practice will be implemented within all of HMCTS' new systems, and data will be sufficiently segmented and protected so that unauthorised access to one part of the core data will not immediately allow access to other parts. A risk assessment can be undertaken for any party considered too vulnerable to interact digitally. Considering the highly sensitive information in asylum and protection cases and the consequences for the appellant and the Home Office should that data be hacked, we recommend that the strongest safeguards be put in place. This includes a precautionary high level of protection of information in all cases which could be required to be anonymised on grounds such as feared persecution or ill-harm. Appellants should not be sent any confidential information via potentially insecure methods such as email or text, but instead should be invited via email or text to logon to the online portal to view such information. HMCTS should put strong identity verification checks in place to ensure legitimate access.

3.37 Presently, the identity of users of the Immigration and Asylum Chambers is not verified and HMCTS does not expect digitisation to change this. We emphasise that this is another opportunity of an online system, which can enable additional checks to verify that the person interacting with the tribunal in respect of their

[53] *TLT & Ors v The Secretary of State for the Home Department & Anor* [2016] EWHC 2217 (QB). See also D. Taylor, "Home Office pays out £15,500 to asylum seeker over data breach", *The Guardian,* 17 January 2018.

appeal is the same person who lodged the appeal (e.g. by providing a login and password to a person when lodging an online claim). However, we also note the increased risk of sensitive data being accessed if logins and passwords are hacked. Enhanced security is necessary. HMCTS will need to give particular thought to how to prevent impersonation when recovering lost passwords and/or login details.

Improving communication with the Home Office

3.38 A striking aspect of the legal culture of the Immigration and Asylum Chambers is that it is by no means uncommon for the only communication between the parties to be very shortly before the hearing itself. There is no specific obligation on the parties to communicate directly with one another (save for the requirement to produce the bundles of documents and legal authorities for the hearing), although there is the overriding objective in the rules of deciding cases fairly and justly and the obligation on the parties to help the Tribunal achieve it.

3.39 In other jurisdictions settlement discussions between the parties are an accepted feature of the landscape. We accept that in this jurisdiction there is also a substantial "cohort of lawyers who consider that litigation is a tactic or strategy that can be used to delay and deter removal proceedings."[54] There seems as well to be a culture that even in the weakest case, which cannot succeed, neither side will concede a point. As the above example illustrates, however, many genuine appellants would benefit from having their meritorious appeals sorted out before the delay, strain and perhaps additional cost of a hearing.

3.40 In our view what is needed is, firstly, a procedure so that representatives can contact the Home Office about rectifying basic errors and where the appellant's legal merits are obvious. Currently, this is very difficult to do. It must be a clearly identified procedure, operating at different points of the process and capable of achieving results. All Home Office communications should indicate a clear and effective point of contact and contact details for each case, and at each stage.

3.41 We consider that constructive engagement with organisations such as the Immigration Law Practitioners' Association might be the way forward for the

[54] See *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin) para. 7.

introduction and monitoring of this new approach. It is self-evident to us that improved channels of communication would assist the submission of new evidence and resolve issues ahead of a hearing. We underline the importance in general terms of Home Office engagement and accessibility in order to relieve pressure on the appeals system.

3.42 Secondly, Home Office presenting officers ("HOPOs"), who as their name suggests present cases before the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber), and Treasury Counsel, who present judicial review cases, must always consider fresh evidence and arguments, address whether a case should be conceded and be prepared to withdraw resistance to an appeal including on the day of a hearing. That means that they must have the authority and confidence to do so. We acknowledge that there may be a difficulty for HOPOs to concede cases and points when they are not the initial decision-maker. Ineffective channels of communication between HOPOs and the senior caseworkers authorising concessions has resulted in unnecessary hearings and an inefficient use of judicial resources.

3.43 We therefore welcome the steps taken by the Home Office so that on the day of a hearing HOPOs can have access either in person (at the larger hearing centres) or by telephone (or other means of communication) to a senior presenting officer to assist them in making the decision to concede or withdraw a case which is no longer defensible. However, from our experience, we are aware that this practice is not always fully effective and we encourage the Home Office to ensure senior presenting officers are available to assist HOPOs as required.

3.44 We also welcome that under its "Next Generation Casework" project, the Home Office is encouraging decision-makers to specialise in specific countries in an effort to improve first-instance decision making. The Working Party considers that developing similar specialisms for senior caseworkers authorising concessions could allow the senior caseworker to have an in-depth knowledge of the country from which the appellant hails and may be an improvement on the current system. The Tribunal still needs to give consent for the Home Office to withdraw an appeal[55] but enabling presenting officers to do so prior to or on

[55] *TPN (First-tier Tribunal appeals – withdrawal)* [2017] UKUT 295.

the day, and to concede points with little merit, is likely to avoid or shorten hearings. This will be an improvement on the way the system currently operates.

Legal and Other Advice/Assistance

There are clear examples of poor and misleading representation. I had an appalling case where the client was told my fee was five times what it actually was. It seems the solicitor, from an ostensibly reputable company, was pocketing the difference. There is little regulation of those offering Immigration services. The most vulnerable are exploited and because there is so often a language barrier, they are unable to understand the system or what an appropriate fee would be in certain circumstances. Moreover, most are blissfully unaware of when they are not being represented properly and cannot recognise when no preparation has been done on their case. Working Party Member.

Legal aid

3.45 Most asylum applicants in England and Wales are entitled to legal aid, as required under the Procedures Directive. Applicants can find legal advice from a solicitor, accredited by the Law Society, or an immigration adviser, accredited by the OISC. Legal aid is outside our terms of reference, but we note that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 reduced legal aid in this area. Almost all immigration and Article 8 ECHR cases (unless they qualify for Exceptional Case Funding) were taken out of scope, with the exception of asylum, human trafficking, immigration detention, domestic violence and judicial review.[56] We also note that since 2013 the number of solicitors providing legal aid in immigration and asylum has reduced by 28%, from 413 in 2013/14 to 294 in 2016/17.[57]

Regulation of immigration advice/assistance

3.46 Since the coming into force of section 84 of the Immigration Act 1999, subject to certain exceptions it has been unlawful for a person to give immigration advice unless regulated by a professional body such as the Solicitors' Regulation

[56] Asylum support and cases before the Special Immigration Appeals Commission were also taken out of scope.

[57] Parliamentary written question, *Legal Aid Scheme: Immigration,* HC 139018, written answer Lucy Fraser MP, 8 May 2018.

Authority ("SRA") or the OISC. The SRA regulates all solicitors in England and Wales; these qualify as solicitors through a combination of training and exams and are required to undertake continuing professional development thereafter.

3.47 OISC regulates immigration advisers not otherwise regulated by professional bodies such as the SRA; advisers qualify for regulation by passing competence assessments (i.e. exams) and are required to undertake continuing professional development thereafter. OISC regulated advisers cannot issue judicial review proceedings themselves but must instruct a barrister to do so. OISC requires advisers to be accredited at Level 3, the highest level, before giving advice on judicial review proceedings. Advisers can undertake any necessary steps in relation to the pre-action protocol but cannot issue proceedings themselves.[58]

3.48 Those wishing to give immigration advice under a legal aid contract also have to pass additional exams in order to be accredited under a scheme now run by the Law Society.

3.49 The SRA has disciplined solicitors giving incompetent and dishonest service in immigration and asylum matters.[59] OISC investigates complaints and serious breaches of sections 91 and 92(b) of the Immigration Act 1999, which criminalise the provision or advertising of unregulated immigration advice or services. OISC reports that there were 16 section 91/92(b) convictions in 2016/17, an increase from 14 in 2015/16.[60] We welcome the SRA's and OISC's efforts. It needs to be redoubled and backed by legal representatives reporting cases to the relevant regulatory body of poor quality legal advice and representation.

3.50 Notwithstanding this regulatory machinery, the Working Party is concerned with what we regard as a gap in the operation of the legislation. Section 84(2)(e) Immigration Act 1999 allows immigration advice to be provided by persons acting on behalf of, and under the supervision of, a qualified person. This, in practice, allows unqualified persons to provide immigration advice. The provision is considered desirable by the SRA and OISC to enable trainees to

[58] See OISC, Practice Note - Judicial Review Case Management, April 2017.

[59] See, for example, *IP v Solicitors Regulation Authority* [2018] EWHC 957 (Admin).

[60] OISC, *Annual Report and Accounts 2016/17* (OGL, 2018), p. 31.

gain relevant experience, provided the level of supervision is adequate. OISC's 2016 Guidance Note on Supervision provides that approval of such supervision arrangements will generally be limited to a period of up to twelve months.

3.51 While we accept the need for trainees to gain experience, we heard of many examples of unsupervised, unqualified persons giving immigration advice. To compound this, the work of unqualified caseworkers may be charged at qualified rates. Either the legislation needs tightening, or regulation in this area must be more effective. We acknowledge that the training and supervision of caseworkers and immigration advisers is a difficult area which is of particular concern. In particular, the Working Party considers that section 84(2)(e) is an ineffective mechanism which does not meet its objective. We recommend that regulatory bodies tighten requirements for firms/practitioners regarding the training and supervision of unqualified caseworkers and immigration advisers in order to improve fairness, efficiency and the quality of advice and representation.

Incompetent and dishonest immigration/asylum advice

3.52 There are a large number of highly dedicated legal practitioners and immigration advisers, providing expert advice on immigration and asylum matters, often under difficult circumstances. However, the experience of one of our members, contained in the quotation at the head of this part of the chapter, is an extreme but far from isolated example. Not only are practices such as that described exploiting clients, often the vulnerable, they undermine the reputation of the diligent and competent and that of the justice system more generally.

3.53 At one level there is poor practice. Both the SRA and OISC have accepted that certain firms provide poor quality legal representation, citing examples of pro-forma grounds of appeal and judicial review applications. In 2016 an SRA commissioned report identified areas of concern in asylum legal representation, including communicating the key client care messages; the role and quality of interpreters; providing an appropriate explanation of costs; meeting the client's specific needs and legal needs; ongoing training and competency of advisers; and the appropriate and professional use of the appeals process.[61]

3.54 The Toynbee Hall report on the quality of immigration and asylum advice in

[61] SRA, *Asylum Report: The quality of legal service provided to asylum seekers* (2016). See also Bar Standards Board, *Immigration Thematic Review* (2016).

Tower Hamlets found some honest and high quality providers, but some "worrying examples of poor practice", including inaccurate and vague information on fees, poor representations to the Home Office and promises of work which do not transpire.[62] The Legal Aid Agency recommended making adjustments for vulnerable clients in distress; keeping clients informed; and delivering clear, concise and relevant advice.[63]

3.55 Along the spectrum is incompetent advice, verging on the dishonest, where proceedings bound to fail are launched, in many cases in what seems to be an attempt to gain the advantage of delay. So concerned was the Administrative Court about this before the bulk of judicial review of immigration and asylum matters was transferred to Upper Tribunal (Immigration and Asylum Chamber), that it established a special procedure called the *Hamid* procedure after the name of the first case.[64] Solicitors and immigration advisors were summoned to appear before a Divisional Court to explain what appeared to be professional misconduct, for example breach of the duty of candour to the court and filing "Totally Without Merit" applications to delay removal from the country when a person had exhausted all legal remedies. Undertakings were taken by the court as to improvements in the practices of firms, including the supervision of caseworkers, and in some cases practitioners were referred to the regulatory bodies.[65] The practice was later adopted in the Upper Tribunal (Immigration and Asylum Chamber).[66]

3.56 The need for the *Hamid* procedure continues in both the Administrative Court and Upper Tribunal (Immigration and Asylum Chamber).[67] The Divisional Court has recently been highly critical of "a substantial cohort of lawyers who

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[62] C. Hutton and S. Lukes, *Trusting the Dice*: *Immigration Advice in Tower Hamlets* (Toynbee Hall, 2015).

[63] A. Sherr, *Improving Your Quality in Immigration and Asylum: A guide to common issues identified through Peer Review* (Legal Aid Agency, 2016).

[64] *R (Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin).

[65] See for example, *R (Awuku) v Secretary of State for the Home Department* [2012] EWHC 3298 (Admin); *R (Butt) v Secretary of State for the Home Department* [2014] EWHC 264 (Admin); *R (Akram) v Secretary of State for the Home Department* [2015] EWHC 1359 (Admin).

[66] *R (Mahmood) v Secretary of State for the Home* Department [2014] UKUT 439 (IAC).

[67] *Shah ('Cart' judicial review: nature and consequences)* [2018] UKUT 00051 (IAC).

consider that litigation is a tactic or strategy that can be used to delay and deter removal proceedings", referring law firms to the SRA for conduct displaying "a serious and persistent failure to adhere to proper standards".[68]

Improving standards

3.57 The Working Party examined a number of proposals to improve the quality of immigration advice and representation. One proposal was for additional qualifications or examinations for immigration practitioners, especially OISC practitioners. After consideration we rejected the idea. We were loath to add additional accreditation burdens for good practitioners and we also recognised that it is not necessarily a lack of legal knowledge and experience which leads to the launch of meritless claims. However we were surprised to learn that the OISC standard of accreditation is not equivalent to the Law Society's Immigration and Asylum Accreditation Standards. We could see no immediate justification for that.

3.58 Although we were reluctant to add to the burden of the Immigration and Asylum Chambers, we saw their roles as central to better professional standards. In addition to greater use of the *Hamid* procedure, we consider that in principle the Immigration and Asylum Chambers should collect and retain information, with contemporaneously recorded reasons, where (a) it is concluded that practitioners have provided poor quality service, and where (b) claims are certified as totally without merit. It will be important that any communication or use of such material be accompanied by safeguards ensuring fairness and proportionality.

3.59 The Working Party also considered how clients could check the name of their legal representative and/or immigration advisor as to whether they have obtained the appropriate training and/or qualifications. At present it is possible to obtain basic information on practitioners through, for example, the SRA or the Law Society website. Following the introduction of online processes we thought that it should be easier to access such information by automatic links, for instance, to the names, qualifications, and record of advisers near the home address of an applicant. Without further inquiry we were reluctant to make a specific recommendation, but we would urge HMCTS to investigate the idea.

[68] *R (Sathivel) v Secretary of State for the Home Department* [2018] EWHC 913 (Admin).

IV. APPEALS TO THE FIRST-TIER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

Introduction

4.1 This chapter considers appeals against adverse decisions of the Home Office on immigration and asylum matters. In the first instance it is the First-tier Tribunal (Immigration and Asylum Chamber) which hears such appeals (where a right of appeal exists). The right of appeal may be available in the UK ("in country") or from abroad ("out of country").

4.2 At the outset we should state that we very much welcome how the First-tier Tribunal (Immigration and Asylum Chamber) itself is changing to meet the challenges it faces. What we attempt to do in this chapter is to sketch out some of these changes and to identify what in our view is necessary if the First-tier Tribunal (Immigration and Asylum Chamber) is to deal with cases fairly and justly as required by the overriding objective of the First-tier Tribunal (Immigration and Asylum Chamber) Procedure Rules 2014. As we suggest, and as required by the Procedure Rules, that also requires the cooperation of appellants, their representatives and the Home Office. Only thus will improvements be of lasting effect.

First-tier Tribunal

Pre-appeal hearing reconsideration

4.3 As we explained in **Chapter 2**, it would assist in settling some cases if there was greater communication between appellants and the Home Office. Considered in this section is pre-appeal hearing reconsideration, a more formal mechanism which would further settlements.

4.4 The experience in judicial review proceedings is that the Home Office will withdraw cases at the permission stage or before, often for pragmatic reasons given that the benefits are outweighed by the costs of continuing, since these costs can rarely be recouped. However, cases are also withdrawn once the Home Office is apprised of a claimant's case and accepts that there are errors in its decision-making.[69] The difficulty in applying a similar reconsideration process

[69] R. Thomas, *Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis* [2015] Public Law 652, figure 11.

to asylum and immigration appeals is that the appellant's case and evidence are usually only presented shortly before the appeal, depriving the Home Office of the opportunity to reconsider decisions in time.

4.5 Against this background, in early 2014 the standard case management directions were changed to require appellants to submit evidence earlier (at least 3 weeks before the hearing) to enable the Home Office to reconsider the case and withdraw its decision if appropriate. However, compliance was generally poor: representatives did not send evidence in early enough for the Home Office to conduct a meaningful pre-appeal review, which meant that the percentage of cases reconsidered and withdrawn remained low. It seems that the purpose behind the change was poorly communicated, not well understood and confidence was lacking that the provision of early bundles would result in a meaningful review. Non-compliance was a problem with both legal representatives and the Home Office.

4.6 In January 2014, following consultation with relevant stakeholders, HMCTS published *The Fundamental Review of the First-tier Tribunal Immigration and Asylum Chamber* ("the Fundamental Review"), which made a number of recommendations for improving processes in the First-tier Tribunal. The Fundamental Review recommended changing case management procedures in the First-tier Tribunal (Immigration and Asylum Chamber) to allow the appellant's hearing bundle to be passed to the Home Office for consideration prior to the appeal.[70] An appeal would only be listed if the Home Office decided not to withdraw the original decision.

4.7 The Home Office already has in place a procedure to review entry clearance refusals which attract a full right of appeal in the light of submissions made by the appellant, although we have been told that in practice, this rarely amounts to any meaningful reconsideration.[71]

4.8 In our view, pre-appeal hearing reconsideration should be revisited and the recommendation of the Fundamental Review adopted. If successful, the measure would be particularly helpful in filtering cases from the appeals system

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[70] *Report of the Fundamental Review of the First-tier Tribunal (Immigration and Asylum Chamber)* (2014), Chapter 2: Case Management. Not publicly available but available to members of the Immigration Law Practitioners' Association.

[71] Home Office Guidance, *Appeal Reviews: APL07*.

where materially significant evidence was not available to the original decision-maker. Pre-appeal hearing reconsideration would act as a second stage after the "minded to refuse" letters process outlined in **Chapter 2**. Whereas the first stage should enable relatively simple immigration and asylum cases to be resolved after the initial decision, the second stage should capture more complex cases where time is needed to obtain evidence.

4.9 The process will need piloting. There will need to be standard directions for appellants and legal representatives to submit their evidence and submissions to the Home Office (and the Tribunal) within a suitable number of days before the appeal hearing. The directions will need to be strictly enforced, to which see our recommendations below. In turn where appellants or their legal representatives have complied, the Secretary of State will need to act. Penalties would attach to his failure to reassess a case resulting in an unnecessary appeal hearing. The initiative will need to be clearly communicated to appellants and their legal representatives. Moreover, we recognise that its success will rely on active case management. Flexibility will be needed regarding the timetable for obtaining evidence; the deadline for the submission of bundles to the Home Office might need postponing. There will need to be realistic listings so as to give sufficient time for appellants to obtain legal aid and expert reports. We are pleased to note that there is currently a new procedure underway (from May 2018) whereby the Home Office reviews appeals that have been awaiting a hearing before the First-tier Tribunal (Immigration and Asylum Chamber) for over 20 weeks at the date of hearing. The review will consider the passage of time, any changes in circumstance and any evidence submitted since the decision was taken.

Tribunal case workers, judges and appellants

Tribunal case workers

4.10 One aspect of the Reform Programme which we especially welcome is the greater use of tribunal case workers (in other jurisdictions they are referred to by terms such as case officers or case progression officers).[72] Tribunal case workers exercise case management functions and assist with the progress of cases through the system. They contact appellants and representatives to ensure

[72] Lord Chancellor, Lord Chief Justice & Senior President of Tribunals, *Transforming our justice system* (2016), chapter 2.

cases are on track and ready for hearing. A major task is to ensure compliance with the rules on the submission of bundles and acting as a sift by identifying poorly-prepared cases. Such cases may include those in which parties have failed to comply with tribunal directions or have submitted bundles late. The result is to relieve judges of the task of handling routine, uncontroversial matters so that their effort can be directed to hearing and deciding cases. Tribunal case workers work under judicial supervision.[73]

4.11 Over time we anticipate that additional functions should be conferred on tribunal case workers. In the short term we see additional roles for them in identifying vulnerable appellants, assisting litigants in person and reporting to the judiciary on instances of poor quality legal representation. In the longer term, legally qualified tribunal case workers could ensure that cases are allocated to the appropriate process, the issues in cases are narrowed and provide the parties with an early neutral evaluation.[74] Functions like this would involve the exercise of delegated judicial authority and would need to be under appropriate supervision, with an automatic right of review.[75]

4.12 The future success of tribunal case workers requires their proper qualification, training and a careful monitoring of their performance. To this end they must be co-located with judges. One matter raised with us was that the experience so far is that tribunal case workers are less likely to grant an adjournment than a judge and that a review of one of their decisions may be more rarely taken and even more rarely overturned. This is where monitoring enters the picture to ensure that decisions are appropriately made, for example, through the collection of data to compare the rate of adjournments granted by tribunal case workers compared to First-tier Tribunal (Immigration and Asylum Chamber) judges.

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[73] Ministry of Justice, *Transforming Our Justice System: Summary of Reforms and Consultation,* CM 9321 (HMSO, 2016), section 5.1.

[74] Sir Ernest Ryder, 5th Annual Ryder Lecture: the University of Bolton, 'The Modernisation of Access to Justice in Times of Austerity',

March 2016, para. 43.

[75] Sir Ernest Ryder, 'The Case for Online Courts', *supra*.

First-tier Tribunal judges and appellants

4.13 The Working Party was troubled by recent research which found considerable variations between First-tier Tribunal (Immigration and Asylum Chamber) judges in the explanations provided to appellants at hearings.[76] Based on observations of 240 First-tier Tribunal (Immigration and Asylum Chamber) hearings, the research found at the outset of the hearing process variations in how judges introduced themselves and the other persons present in court, explained the purpose of the hearing, stated their independence, checked that the interpreter and the appellant understood each other (beyond a simple yes/no response), explained how the hearing would proceed and informed appellants that they could say if they did not understand.[77] The research also found that the likelihood of granting in-session adjournment requests differed significantly between hearing centres. In addition, there are other reports highlighting geographic variation in the outcome of asylum appeals.[78]

4.14 In our view short but comprehensive audio and video guides would improve the consistency with which appellants are informed about the hearing process.[79] These should be available in different languages online and at hearing centres, and appellants should be encouraged to access them. They would parallel official videos such as 'Going to court – a step by step guide to being a witness'.[80] Judges would be relieved of the need to explain matters in detail, although it would still be necessary that they continue to put litigants in person at ease in what for many will be unfamiliar territory. These resources would go some way to ensuring that appellants were able to advance their best case.[81]

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[76] N. Gill, R. Rotter, A. Burridge, and J. Allsopp, 'The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals', Social and Legal Studies, Vol. 27, Issue 4.

[77] *Ibid,* p. 58.

[78] C. Nye and L. Sands, 'Asylum seekers face appeals 'lottery'', *BBC News,* 29 November 2017.

[79] A member of our working party is currently collaborating with *Asylum Aid* to develop such a video.

[80] Ministry of Justice, 'Going to court as a witness: 7. The trial - what to expect'.

[81] For more on how to ensure appellants' best evidence in asylum cases, see G. Clayton and others, *Through her Eyes: Enabling women's best evidence in UK asylum appeals* (Asylum Aid, NatCen and Migrants Resource Centre, 2017), p. 5, and 16.

4.15 The variation in the outcome of interlocutory and final determinations is a more difficult problem. In some cases differences may reflect the nature of a hearing centre's caseload. In any event, decision-making in any field where judgment is involved will be subject to variation. Reasonable people can reasonably reach different conclusions. Nonetheless, if there is a variation between hearing centres this is matter for further inquiry and reflection both centrally and at the hearing centres themselves.

4.16 There are no easy solutions, but national consistency in decision-making would be enhanced by more connections and interchanges between centres through inter-centre communication and peer observation. The Tribunal itself acknowledges the need for regular judicial training, not least because immigration and asylum is characterised by rapid change, high volumes and complexity.[82] We welcome the steps being made by HMCTS and the Judicial College on judicial training requirements, including judicial IT capability.

4.17 Although not within our terms of reference, we were told on various occasions that morale among First-tier Tribunal (Immigration and Asylum Chamber) judges is not as it should be. This may reflect a more general problem of tribunal judges not feeling valued by the legal profession.[83] JUSTICE's *Increasing Judicial Diversity* Working Party report found that little progress had been made towards establishing a career path for tribunal judges.[84] The report identified a perception that there was a strong divide between tribunal and court judges. It recommended a "talent management programme" to improve career development. We agree that these recommendations, if adopted, would go some way to improving morale and overcoming this perception. Many of the cases in the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber), raise complex and challenging issues of law which make the work of its judges particularly demanding.

4.18 Finally, we should mention vulnerable appellants. The Joint Presidential Guidance Note No. 2 of 2010 (Child, vulnerable adult and sensitive appellant guidance) ("the Note") lists factors such as mental health problems; social or learning difficulties; religious beliefs and practices; sexual orientation; ethnic, social and cultural background; domestic and employment circumstances; and

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[82] Senior President of Tribunals' Annual Report 2017, p. 30.

[83] C. Thomas, *2016 UK Judicial Attitude Survey* (UCL Judicial Institute, 2017), p. 9.

[84] JUSTICE Working Party, *Increasing Judicial Diversity* (JUSTICE, 2017).

physical disability or impairment that may affect the giving of evidence as factors that must be taken into account.[85] The Note gives welcome guidance on steps that must be taken before and during the substantive hearing. However, we were concerned that the research previously mentioned suggested that the needs of vulnerable appellants are not always accommodated.[86] The resources previously mentioned in the form of audio and video guides would go some way to relieving potential anxiety and confusion by familiarising vulnerable appellants with the process of appearing before the tribunal. This is an area where the increased use of technology through the Reform Programme presents opportunities, in this case for supporting vulnerable users of the Immigration and Asylum Chambers.[87] We are aware that following the case of *AM (Afghanistan),* there are plans to establish procedures for the appointment of litigation friends, where appropriate.[88] The Working Party welcomes this development.

Changing the legal culture

4.19 In using the concept of legal culture, writers on judicial administration are concerned with the common norms and practices associated with day to day case handling and party behaviour in a court or tribunal. A legal culture can be removed from how a court or tribunal is supposed to work under its rules and practice directions. The concept is helpful in reminding us that reforms will not necessarily achieve their desired effect if the legal culture does not change as well.

4.20 What struck the Working Party from the outset of its inquiry was the number of procedural problems facing the First-tier Tribunal (Immigration and Asylum Chamber): delays in hearing appeals; inefficiencies in the use of judicial time;

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[85] Joint Presidential Guidance Note No. 2 of 2010: Child, vulnerable adult and sensitive appellant guidance, para. 3.

[86] N. Gill, 'The limits of procedural discretion', *supra*, p. 49.

[87] See also the Court of Appeal's guidance to the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber) to ensure that children, young people and vulnerable persons have an effective right of access to the Tribunal: *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123.

[88] *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123.

non-compliance with the rules and tribunal directions; cases progressing slowly and being unjustifiably drawn out; and unnecessary hearings. In as much as there is statistical evidence of these problems, it is stark. Thus the average time taken at present to clear appeals stands at 52 weeks, which is an increase of two weeks over the same period in 2016.[89]

4.21 The sources of these problems are many. Quite apart from anything else, the reality is that it is at times in the interest of appellants to delay matters. Moreover, we accept that often the solution lies outside the control of the tribunal and the judges. A simple illustration is provided by what we were told were the delays in bail hearings for those in immigration detention: for example, for one reason or the other, representatives do not always arrive in time for a pre-hearing conference with their client, and the immigration removal centre does not open the live link with the tribunal for the case to start promptly.

4.22 Overall, we see the need for a culture change in the First-tier Tribunal (Immigration and Asylum Chamber). Existing practices need to be re-examined in light of its Overriding Objective that cases be dealt with fairly and justly. Better case management, judicial training and enforcement of the rules are at the heart of any solution. The parties' obligation in the rules to co-operate with the Tribunal needs to be reinforced by action against errant practitioners and the Home Office. Grounds of appeal and written submissions need to be confined to a reasonable length. An object of the culture change which we advocate would be that all parties work towards narrowing the issues at the earliest possible stage to ensure the just and speedy determination of cases.

Oral judgments and delivering written judgments

4.23 Within the First-tier Tribunal (Immigration and Asylum Chamber) we were struck by practices which may have been justified at some point but seem outdated in the present day. Whereas the practice in many jurisdictions is that oral judgments are given, even in appellate courts, First-tier Tribunal (Immigration and Asylum Chamber) judges must provide written reasons for their decisions in asylum or humanitarian protection claims, and are routinely required to reduce their judgments to writing in other claims, however,

[89] Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly: October to December 2017, Main Tables (October to December 2018), extrapolated from Table T.2.

straightforward the case.[90] That can result in substantial delays to judgments being handed down. It also leads to a rigidity in sitting patterns, since judges are given one day for judgment writing for every day they sit (although that judgment writing day is also for preparation of future cases and checking and promulgating previous matters). For complicated judgments, involving numerous issues of fact and law, this sitting pattern can disguise the time needed for the preparation, writing and proof-reading of a determination.

4.24 There is also what we regard as an unnecessary rigidity in the form that written determinations take. The Fundamental Review noted that:

[A] great deal of time and effort is expended in setting out matters of detail which are not directly relevant to the issues in the appeal being decided. There is a perception that this is necessary to avoid successful onward appeals, and that a determination has to be a 'stand-alone' document setting out within itself all the material in the case. The result is overlong determinations, and perhaps the expenditure of too much time on them.[91]

4.25 The delivery of oral (ex tempore) judgments, where appropriate, was an idea suggested by the Fundamental Review. It also recommended the introduction of structured-decision making, used elsewhere in the Tribunal system and an approach the Judicial College supports. Essentially, structured-decision making entails dealing with issues methodically, with the ability to incorporate other documents by reference.

4.26 As this report is being prepared, the First-tier Tribunal (Immigration and Asylum Chamber) is in the process of testing oral judgments.[92] The President of the Upper Tribunal (Immigration and Asylum Chamber) has said, and we agree, that oral judgments will not be suitable for all proceedings.[93] With the more complex cases they require adequate preparation time. Judicial training, and sharing experiences with jurisdictions where oral judgments are the norm,

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[90] See the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Procedure Rules 2014, Chapter 3, Rule 29(3)

[91] *The Fundamental Review, supra,* p. 20.

[92] *The Fundamental Review* p. 20.

[93] *MT and ET (child's best interests; ex tempore pilot) Observations of the Proof of Concept Ex tempore Judgment Pilot* [2018] UKUT 88.

is necessary to the successful introduction of the practice. In our view, however, oral judgments are the norm elsewhere and it is difficult to see why the First-tier Tribunal (Immigration and Asylum Chamber) should be different. The Working Party considers that the Fundamental Review recommendation for the delivery of oral judgments where appropriate should be implemented following the First-tier Tribunal's (Immigration and Asylum Chamber) pilot. Oral judgments should be properly recorded with the transcribed version of the oral determination being accessible to the parties.

4.27 The Working Party considered how best to deliver tribunal decisions digitally. Currently, asylum appeal decisions are delivered some time after an asylum appeal hearing by post. Given the highly sensitive nature of asylum cases, there may be safeguarding issues around delivering determinations in immigration and asylum appeals digitally. The digital system must ensure that the appellant can receive the decision in a secure manner and at no extra cost.

Compliance with rules, directions and orders

4.28 An issue which greatly concerned us was the extent to which there is a culture in the First-tier Tribunal (Immigration and Asylum Chamber) of non-compliance with the rules. Often this is quite basic, but even so can be the cause of substantial inefficiencies. For example, appeal bundles can often be unnecessarily long, un-paginated, and lacking the proper indexing and highlighting required by the Practice Directions.[94] Incomplete and missing bundles are relatively common, and delays in serving and sharing bundles are a common cause of adjournments. One empirical study found that on average nearly a tenth of the time in hearings is wasted discussing the bundle and how its inadequacies are to be addressed.[95]

4.29 While digital working will not eliminate all the difficulties with bundles, it should ameliorate many. We also consider that all hearings before all tribunals, including virtual hearings and telephone hearings, should be recorded and the recording securely retained. The Fundamental Review also recommended that

[94] Practice Directions: Immigration and Asylum Chambers of the First-tier and Upper Tribunal, para. 8.2.

[95] Calculation provided to the Working Party based on data collected for the study reported in N. Gill, and others 'The limits of procedural discretion: Unequal treatment and vulnerability in Britain's asylum appeals', *supra.*

the whole proceedings be recorded using digital audio recording equipment so as to ensure that any allegations of judicial misconduct can be considered as well as any onward appeals claiming that a matter "raised during the hearing was not appropriately addressed in the final judgment."

4.30 A further procedural problem is prolixity in the grounds of appeal and skeleton arguments. That is quite apart from how shortly before or on the day of the hearing cases will be amended, extending the preparation time for judges, confusing the issues and shifting the focus of an appeal. The Practice Directions contain requirements for the preparation of hearing bundles and for brief skeleton arguments and written submissions, but afford discretion to representatives on overall length and organisation. By comparison the rules in other jurisdictions prescribe the purpose and length of grounds of appeal and skeleton arguments.[96] We note that recently the Criminal Procedure Rules were amended to emphasise the importance of clarity and conciseness in an appellant's grounds of appeal.[97]

4.31 First-tier Tribunal (Immigration and Asylum Chamber) President Clements recently acknowledged the lack of compliance and the impact that this has on the tribunal's operational efficiency.[98] Enforcement of the tribunal's rules and directions, and the orders judges make, is central to case management and the disposal of appeals fairly and justly. One particular benefit would be a reduction in the number of adjournments. At present cases not ready for a hearing because of failure to comply must be adjourned to ensure a fair hearing, at the expense of efficiency.[99]

4.32 Sanctions for non-compliance can take a number of forms such as cost awards. We accept that imposing them is not always straightforward. It is difficult to

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[96] Civil Procedural Rules, Practice Direction 52A, Appeals, Section 5, Practice Direction 52C, Appeals, paras. 5 and 31; Administrative Court, Judicial Review Guide 2017, para. 17.

[97] Rule 16 of the Criminal Procedure (Amendment) Rules 2018 amends rule 39.3 of the Criminal Procedure Rules (Appeal to the Court of Appeal about conviction or sentence; Form of appeal notice) and the Criminal Procedure Rule Committee has recommended to the Lord Chief Justice that he consider imposing constraints on other written submissions by way of the Criminal Practice Directions, see *A Guide to the Criminal Procedure (Amendment) Rules 2018 (S.I. 2018/132),* p. 5.

[98] *Senior President of Tribunals' Annual Report 2017*, p. 51.

[99] *Nwaigwe (adjournment: fairness)* [2014] UKUT 418 (IAC).

apply sanctions against an appellant's representative when it may be the appellant who is at fault. Strike out powers against appellants will not always be appropriate given the importance of the rights at stake. Costs should not fall on appellants if they did not know about or understand the need to provide evidence earlier, or may have not been in a position to do so.

4.33 Wasted costs orders against an appellant's representatives personally are sometimes advanced as a solution. These may be made under section 29(4) of the Tribunal, Courts and Enforcement Act 2007 and rule 9(2)(a) of The Tribunal Procedure (First-tier Tribunal (Immigration and Asylum Chamber)) (Immigration and Asylum Chamber) Rules 2014. There is also a separate power under rule 9(2)(b) of the 2014 Rules to order costs against a person who has unreasonably brought, defended or conducted proceedings.[100] In *Cancino* the Chamber Presidents found that costs under rule 9(2)(b) are the exception rather than the rule.[101] This was reiterated by the Chamber Presidents in *Awuah (No. 2)*[102] in respect of rule 9(2)(b), (*Awuah* having excluded Home Office presenting officers from wasted costs orders made under rule 9(2)(b) but not the Secretary of State for the Home Department).[103]

4.44 The experience in other jurisdictions is that wasted cost orders are an important reserve power, but that they can be time-consuming, necessitating an additional hearing, and perhaps giving rise to satellite litigation (i.e. separate actions which stem from the original action).

4.45 Sanctions for non-compliance will never work without a change in the legal culture of a judicial body. If the expectation is that parties will comply with rules, directions and orders, the need for sanctions is reduced. Compliance becomes the norm and non-compliance deviant. Better case management, judicial training, and tough action against incompetent and dishonest practitioners run together in ensuring that compliance by parties with the rules and practice directions becomes the norm. All of this needs to be supported by the Upper Tribunal (Immigration and Asylum Chamber) in their decisions.

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[100] Rule 9(2)(b), Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604).

[101] *Cancino (costs - First-tier Tribunal - new powers)* [2015] UKFTT 00059 (IAC).

[102] Unpublished as of June 2018.

[103] *Awuah and Others (Wasted Costs Orders - HOPOs - Tribunal Powers)* [2017] UKFTT 00555 (IAC).

V. HEARINGS IN THE FIRST-TIER AND UPPER TRIBUNALS (IMMIGRATION AND ASYLUM CHAMBER)

Introduction

5.1 The appeal processes in the Immigration and Asylum Chambers are currently oral substantive appeal hearings (and error of law hearings in the Upper Tribunal (Immigration and Asylum Chamber)), with both parties present at all stages. Live witness evidence is given in both tribunals, with interpreters when necessary. Historically, there have been virtual error of law hearings only in the Upper Tribunal (Immigration and Asylum Chamber).

5.2 This chapter examines how tribunal hearing centres might be configured within the Reform Programme and the proposals for online courts. We focus on two specific models, video-conferencing and virtual hearings, although we see developments as falling along a spectrum. By video-conferencing we mean hearings which involve some participants communicating by video-link. HMCTS' digitisation plans for tribunals, including the Immigration and Asylum Chambers, envisage the expansion of video-conference hearings.[104] Fully virtual hearings are hearings in which all participants communicate by video-link. HMCTS is currently exploring fully virtual hearings for courts and tribunals.

5.3 We understand from HMCTS that there are no plans for telephone conferencing to be used other than for case-management hearings, a limitation which we welcome.

Hearings in the future

Principles

5.4 Before considering video-conferencing and virtual hearings we think it appropriate to make some general points. We recognise that their use in the

[104] Ministry of Justice, *Transforming Our Justice System: Summary of Reforms and Consultation*, *supra,* section 5.

Immigration and Asylum Chambers could have considerable advantages. Important are the savings in cost and time (i.e. travel) on the part of those who appear, notwithstanding the additional costs of providing the service, compared with the cost and time associated with the current system. There is also the increased capacity to obtain evidence from participants, such as witnesses, in remote locations, who could not contribute otherwise. As well, video-conferencing and virtual hearings may be associated with reduced delays, faster hearings, a more conducive and less intimidating environment for participants, and safety and security advantages.

5.5 However, the introduction of video-conferencing and virtual hearings in the context of immigration and asylum hearings needs to be considered against the background of certain principles.

5.6 First, there is the *principle of open justice*, a fundamental principle of our system of justice. Virtual hearings are modelled to be accessible only to the participants. This raises the concern in any situation where in principle public hearings should be open to any member of the public or the press who wants to observe. However, in this context the disclosure of information could increase the risk to an appellant, including on return to a country of origin; an appellant may have requested an all-female (or all-male) tribunal, for religious or other reasons; or an appellant may have disclosed personal, intimate, private or commercially sensitive information in support of their case. With the current "open court" proceedings, the judge is able to see who is viewing the proceedings and decide whether it is appropriate for that person to do so. With video-conferencing and virtual hearings, if persons are not gathered in secure places, there may be an inability to control who is viewing the proceedings and it may be relatively easy to record and distribute the material.

5.7 We therefore recommend that in these circumstances judges should retain the discretion to order that proceedings occur in the traditional way. To help allay their fears we also recommend that it be made clear to appellants and witnesses about who might be able to view the proceedings. We also recommend specifying to appellants and witnesses what will happen to the recording and data generated; whether the decision will be publicly accessible; and how privacy will be upheld in the process of delivering the decision.

5.8 The second principle is that the judge must be in no worse position than at present to *assess credibility*. Video-conferencing and virtual hearings may have

a distorting effect on perceptions, especially with the loss of non-verbal cues.[105] This may be exacerbated if the judge's view is of a number of participants on a single screen, unless they are also able to zoom in on individual participants to better view their facial expressions. With expensive systems, such as the recent research on the so-called distributed courtroom, participants appear life-size and the high-definition quality can produce an increased sense of involvement and perceptual realism. It may be possible with appropriate measures to replicate eye contact.[106] Most research into these matters is dated and we suggest further research to understand better the effect in assessing credibility by judges.

5.9 The third principle is that *appellants must be in no worse position* with video-conferencing and virtual hearings. We say this because we are unclear whether these will impede the ability of appellants to participate fully and/or impede communications between appellants, interpreters and legal representatives. Appellants may have greater difficulty in participating or understanding the proceedings, and may feel alienated, distressed or fatigued.[107] Video-conferencing and virtual hearings also change the symbolism of the judicial process.[108] All of these effects need more studying in the real world to understand whether they can and do have a bearing on the outcome of cases.

5.10 It may be that video-conferencing and virtual hearings are suitable for some participants but not others. Asylum appellants, unrepresented appellants, detainees, (large) families, those with sensitive or complex appeals, minors and other vulnerable appellants – these may be categories where video-conferencing

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[105] A. Haas, 'Videoconferencing in Immigration Proceedings', 5 Pierce L. Rev. 59 (2006), 5(1), p. 72; K. Orcutt, G. S. Goodman, A. E. Tobey, J. M. Batterman-Faunce, & S. Thomas, S., 'Detecting deception in children's testimony: Factfinders' abilities to reach the truth in open court and closed-circuit trials', *Law and Human Behavior,* (2001) *25*(4), 339-372; in A. Haas, *supra*..

[106] In the Distributed Courtroom, video-conferencing participants appear life-size by flat 75-inch screen, with the brightness dimmed and the judge's face lit up so they are equally prominent. The size of the screens, and the high-definition quality, 'produce an increased sense of involvement and perceptual realism'. High-definition is an advanced level of video quality. See D. Tait, *ibid*.

[107] See C. McKay, 'Video Links from Prison: Court "Appearance" within Carceral Space', Law, Culture and the Humanities, (2015), Vol. 14, issue 2, pp. 242-262.

[108] See E. Rowden, 'Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?', Law, Culture and the Humanities, (2015) Vol. 14, Issue 2, pp. 263-281.

and virtual hearings are unsuitable. Even with adjustments, those with mental or physical disabilities or impairments might fall into the unsuitable category.[109] With out-of-country appeals, there are also difficulties in evidence gathering, liaising with legal representatives and witnesses, and giving instructions to expert witnesses in the UK.

5.11 One specific aspect of this principle concerns the location of the interpreter and the appellant's advocate. It would seem that interpreters are best co-located with the appellant.[110] That could present difficulties for the hearing judge in checking that the interpreter is an approved interpreter, communicating directly with the interpreter and controlling the interpreter to avoid collusion, coaching or other forms of interference. There is also the question of whether an advocate needs to be co-located with the appellant both from a practical point of view (i.e. so that the advocate can easily confer with and provide greater reassurance to the appellant) and in view of the possible effect on the appellant (if not the judge).

5.12 The fourth principle is that video-conferencing and virtual hearings *must not jeopardise security*. We have already touched on this but by this we mean that there will be circumstances in the context of the Immigration and Asylum Chambers, outlined above, where disclosure of information during the course of a hearing needs to be restricted. In such cases, there need to be proven, secure channels of communication. A cyber-security breach must be notified immediately to the judge who heard the case.

5.13 Finally, *practical effectiveness*, the system must work. HMCTS is aware that various practical measures are necessary for hearings to be effective.[111] These include having the appropriate technology and internet speeds to enable sound and vision to be transmitted as accurately as possible; having a fall-back in case of system failure; making provision for client conferencing; using large enough screens, with sufficient resolution; using suitable lighting, contrast, focus and camera angles; giving the appellant (or witnesses) suitable IT support and an introduction to the process; training for judges, most particularly on the

[109] See M. Crock, C. Ernst & R. McCallum, 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' (2012) 24 International Journal of Refugee Law 762.

[110] P. Gleason, *Reality TV for Immigrants: Representing Clients in Video Conference Hearings*, (2000) 5 Bender's Immigration Bulletin 732; A. Haas, *supra*, p. 64.

[111] See *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 00443 (IAC).

assessment of credibility, and on the additional directions that may have to be given in this context; IT support for judges; providing a suitably comfortable and safe environment to give evidence from; limiting distractions for participants and maintaining order; imbuing the proceedings with the appropriate degree of court majesty and introducing 'rituals' to mark the solemnity of hearings (e.g. to replicate the existing practice of standing when the judge enters the courtroom); enabling a zoom function where appropriate and limiting it where not; providing a feedback screen where that would be helpful (and omitting it where it would not); giving appellants (and witnesses) the ability to control their environment to a degree, and providing facilities for the electronic sharing, display and navigation of documents both in advance and on the day.

Video-Conferencing

5.14 The Immigration and Asylum Chambers currently conduct some hearings via video link, with the appellant and/or their representative appearing remotely.[112] Most bail hearings for those in immigration detention are presently held by video link, although some concern has been expressed about the impact of video link on communications in bail hearings.[113] The Working Party also heard complaints around the quality of existing video links, including difficulties in hearing what is being said and breakdowns of the link.

5.15 Between June and September 2016, the Home Office and HMCTS ran a pilot to test participation of HOPOs elsewhere participating at hearings in Belfast via video-link. Aside from a few technical issues, the pilot was generally thought by those involved to have worked well. HOPOs do not give evidence as such, and as 'repeat players' in the Immigration and Asylum Chambers may be able to adapt to its use much better than appellants or witnesses.

5.16 There are also out of country appeals, which the Supreme Court considered in *Kiarie and Byndloss*, observing: "[t]here is no doubt that, in the context of many appeals against immigration decisions, live evidence on screen is not as

[112] See the Upper Tribunal (Immigration and Asylum Chamber), Guidance Note 2013 No 2: Video link hearings.

[113] A. Lindley, *Injustice in Immigration Detention: Perspectives from Legal Professionals* (Bar Council, 2017), p. 21.

satisfactory as live evidence given in person from the witness box."[114] The court quoted comments of the Upper Tribunal (Immigration and Asylum Chamber) in *Mohibullah:*[115]

> *Experience has demonstrated that in such cases detailed scrutiny of the demeanour and general presentation of parties and witnesses is a highly important factor. So too is close quarters assessment of how the proceedings are being conducted - for example, unscheduled requests for the production of further documents, the response thereto, the conduct of all present in the courtroom, the taking of further instructions in the heat of battle and related matters. These examples could be multiplied. I have found the mechanism of evidence by video link to be quite unsatisfactory in other contexts, both civil and criminal. It is not clear whether the aforementioned essential judicial exercises could be conducted satisfactorily in an out of country appeal. Furthermore, there would be a loss of judicial control and supervision of events in the distant, remote location, with associated potential for misuse of the judicial process.*[116]

5.17 Away from immigration and asylum, there is by now a considerable experience of video links in the criminal and family justice system.[117]

5.18 Our consideration of the research available suggests that there are a number of unanswered questions regarding the effective participation of witnesses and appellants in substantive hearings via video-conferencing.[118] Without further research into its use in immigration and asylum proceedings, we cannot recommend its wholesale use at this stage.

5.19 What we do recommend is that in addition to bail proceedings, video-conferencing be used initially in a limited number of circumstances where it

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[114] *Kiarie and Byndloss, supra,* para. 67.

[115] *R (Mohibullah) v Secretary of State for the Home Department* [2016] UKUT 561 (IAC).

[116] *Kiarie and Byndloss, supra*, para. 90.

[117] P. Gibbs, *Defendants on video – conveyor belt justice or a revolution in access?* (Transform Justice, 2017).

[118] See, for example, I. V. Eagly, 'Remote Adjudication in Immigration' (2015) 109 Northwestern University Law Review 933, 960, which suggests that video-conferencing appellants engage less in the adjudicative process than those with in-person hearings.

can be subject to monitoring and research: case management hearings; cases in which the parties are agreed, subject to the Tribunal ruling that video conferencing is inappropriate; cases in which the appellant is not present and the Tribunal rules that it would be fair and just for video conferencing to occur; and out-of-country appeals from a controlled location and only insofar as they are human rights compliant.

5.20 In our view video-conferencing for substantive appeals should be introduced only after these procedures are shown to be successful, and further research and piloting establishes that effective communication is possible between the claimant/appellant and their representative; that representative and the HOPO; and the judge and all parties. Its introduction should occur in stages, with monitoring and evaluation at each stage. Appellants and witnesses should give evidence from a controlled location to facilitate better judicial supervision and minimise the risks of coaching or coercion.[119]

Virtual Hearings

5.21 In broad terms, what HMCTS envisages for virtual hearings is as follows: (1) each participant in the hearing would be in a different location facing a screen and a camera. Once a hearing has begun, they would each be able to view the other participants on their screen. (2) Participants would wait in a virtual 'waiting room' until the hearing. Communication between participants would not be possible in the waiting room. The only communication possible would be with the virtual hearings administrator. However, participants would be able to go to a separate virtual 'conference room' for a conference before the hearing. (3) Staff would be on hand to help set-up and test the video-link and make necessary adjustments. Bandwidth, seating, lighting, the position of appellant relative to the camera and other matters would all be tested and arranged beforehand. (4) When ready, the judge would bring all participants into the virtual "hearing room". There will be a clear demarcation between the waiting room and the hearing room and the judge will also be clearly identifiable. Each participant would also be visible to participants on separate panes on their screen.

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[119] The Upper Tribunal (Immigration and Asylum Chamber) in *Mohibullah* said, in the context of video-conference proceedings, "there would be a loss of judicial control and supervision of events in the distant, remote location, with associated potential for misuse of the judicial process." *Mohibullah, supra,* para. 90. See also S. Ellis, *Videoconferencing in Refugee Hearings*, Ellis Report to the Immigration and Refugee Board of Canada Audit and Evaluation Committee (2004).

5.22 In October 2017, HMCTS ran a proof of concept testing fully virtual hearings in the First-tier Tribunal (Immigration and Asylum Chamber) using a small sample of real case management hearings, giving participants in legal firms the opportunity to log in from their own equipment without needing access to specialist software. HMCTS reports that the trial was successful and that the "hearings were well received by the judges, legal professionals and the Home Office presenting officers who took part."[120] Participating legal firms reported that the proof of concept presented significant opportunities for them, including being able to attend multiple hearings in a day without the need to travel between court buildings. Further test cases on the use of virtual hearings are planned for 2018 in the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber). A direction from the President of the Tribunals is anticipated to govern their use.

5.23 There must be a wealth of experience in relation to the use of advanced forms of video-conferencing, if not necessarily in terms of virtual hearings per se. We recommend that HMCTS conducts a study looking at instances where video conferencing is used in court proceedings to take evidence from witnesses or defendants in this jurisdiction as in the criminal and family courts and in criminal bail applications. It should analyse the current use and effectiveness of video-conferencing in immigration proceedings in Australia, Canada and the US. Judges, lawyers and parties should be interviewed.

5.24 The Working Party considers that Virtual Hearings should not occur in the Immigration and Asylum Chambers unless the technology is appropriate. Furthermore, Virtual Hearings must be timely, fair and just. All parties in Virtual Hearings should be treated equally.

5.25 We recommend that initially, Virtual hearings for substantive appeals should be introduced: (1) only after further piloting which establishes that meaningful discussions are possible between (a) the claimant/appellant and their representative and (b) the claimant/appellant's representative and the Home Office presenting officers; and (2) in stages, with monitoring and evaluation at each stage, before extension to the more sensitive cases (e.g., those involving gender based violence; sexual orientation, gender identity; torture; mental health; children and other vulnerable groups). Initially, virtual hearings only be

[120] S. Acland-Hood, 'Video hearings can make a difference for court and tribunal users', *Inside HMCTS Blog*, 15 February 2018).

used for: (1) case management hearings; (2) cases in which the parties are agreed, subject to the Tribunal ruling that a virtual hearing is appropriate; (3) cases in which the appellant cannot be present and the Tribunal rules that it would be fair and just for a virtual hearing to occur, including in out-of-country appeals (from a controlled location).

VI. APPEALS TO THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER), JUDICIAL REVIEW AND THE COURT OF APPEAL

Introduction

6.1 In this chapter we are concerned with three additional avenues to challenge decisions on immigration and asylum matters, apart from the statutory appeal procedure in the First-tier Tribunal (Immigration and Asylum Chamber) discussed in Chapter 4. First, there is the possibility of appealing an adverse decision of the First-tier Tribunal (Immigration and Asylum Chamber) in a statutory appeal to the Upper Tribunal (Immigration and Asylum Chamber). The success rate for appeals before the Upper Tribunal (Immigration and Asylum Chamber) has been falling over the years and is now around 32 percent (24 percent in asylum; 35 percent in immigration).[121]

6.2 Secondly, there are claims for judicial review. In the main, a claimant will be applying for judicial review of a decision made by the Home Secretary on an immigration or asylum claim. The decision challenged may follow an earlier appeal by claimants who contend, unsuccessfully before the Home Secretary, that there is new material which justifies a fresh claim despite their having exhausted their statutory appeal rights. The application for permission to apply for judicial review will be that the decision of the Home Secretary to reject the fresh claim was irrational in public law terms.

6.3 The vast majority of judicial review claims in the immigration and asylum field are dealt with in the Upper Tribunal (Immigration and Asylum Chamber). Jurisdiction for the judicial review of immigration and asylum decisions is retained by the Administrative Court in only a few areas, for example, where a claimant argues that he has been unlawfully detained or in the case of most nationality decisions.[122] Between 2014 and 2016, there were 7,053 immigration or asylum judicial reviews lodged in the Administrative Court although some of these may then have been transferred to the Upper Tribunal (Immigration

[121] Ministry of Justice, Tribunals and Gender Recognition Statistics Quarterly: October to December 2017, Main Tables (October to December 2017), Table UIA.3.

[122] See Direction of the Lord Chief Justice under section 18(6) of the Tribunals, Courts and Enforcement Act 2007 ('the Transfer Direction').

and Asylum Chamber). This compares with 33,063 judicial reviews determined by the Upper Tribunal (Immigration and Asylum Chamber) for the period 2014/15 to 2016/17.[123] In 2017 some 95 percent of judicial review claims in immigration and asylum were handled in the Upper Tribunal (Immigration and Asylum Chamber).[124]

6.4 There are two aspects of judicial review in immigration and asylum which deserve specific mention. One is what are called *Cart* judicial reviews,[125] challenging in the Administrative Court a refusal by the Upper Tribunal (Immigration and Asylum Chamber) to grant permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) in a statutory appeal. *Cart* claims can be brought on only narrow grounds and very few succeed. Between 2012 and 2016, of the 3,452 immigration *Cart* challenges lodged, 3,056 were refused permission, 162 were granted permission (the remainder were presumably withdrawn or settled), and only six were ultimately allowed.[126]

6.5 The other specific aspect is that if in an age assessment case the Administrative Court has granted permission for an application for judicial review, and transferred the case, the Upper Tribunal (Immigration and Asylum Chamber) hears it to determine the applicant's age. Whether asylum applicants are under 18 years old is important in determining the benefits they receive. There are proportionately few age assessment cases in the Upper Tribunal (Immigration and Asylum Chamber), but hearing them is a resource intensive exercise.

6.6 Thirdly, we examine applications for permission to appeal in immigration and asylum matters to the Court of Appeal. These may be applications for permission to appeal in the case of statutory appeals, which have already been considered by the Immigration and Asylum Chambers, or they may be applications for permission to appeal a refusal by the Upper Tribunal (Immigration and Asylum Chamber) or the Administrative Court in the case of

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[123] High Court data extrapolated from the Ministry of Justice, Civil Justice Statistics Quarterly: April to June 2017 Tables, Civil Justice and Judicial Review, Table 2.1; Tribunal data sourced from the Tribunals and Gender Recognition Statistics Quarterly: April to June 2017, Table UIA.3.

[124] Senior President of Tribunals' Annual Report 2017, p. 28,

[125] Named after *R (Cart) v The Upper Tribunal* [2011] UKSC 28, now in CPR 54.7A(7).

[126] Extrapolated from Ministry of Justice, Civil Justice Statistics Quarterly, April to June 2017, Civil Justice and Judicial Review data.

an application for permission to apply for judicial review. The volume of such applications has caused substantial delays in the Court of Appeal, not only with these applications but also with the other work the court handles.

6.7 Appeals against adverse decisions and the review of administrative decisions are essential features of our system of justice. The need for corrective procedures is widely recognised and part of the rule of law. But the number of stages available in immigration and asylum cases is putting pressure in terms of the volume of work at each stage of the process. There are consequent delays in various parts of the system, sometimes to the detriment of those with other types of claim. The number of opportunities available to challenge decisions, with the benefit of delay this gives to meritless claims, can be to the detriment of those with genuine cases. We have tried to strike a balance between these different considerations in the recommendations we make below.

Statutory appeals from the First-tier Tribunal to the Upper Tribunal

Permission stages

6.8 Either party to a statutory appeal in the First-tier Tribunal (Immigration and Asylum Chamber) may apply for permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) on a point of law.[127] Permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) is sought in writing first from the First-tier Tribunal (Immigration and Asylum Chamber) itself and, if refused, can be renewed in writing to the Upper Tribunal (Immigration and Asylum Chamber).[128] If refused at that point the only remedy available is a *Cart* judicial review.

6.9 Anecdotal evidence suggests that in most cases where permission to appeal is refused by the FTT, the application is renewed to the UT.

6.10 The Working Party considered whether the First-tier Tribunal (Immigration and Asylum Chamber) permission stage should be abolished and whether having a single permission stage for appealing to the Upper Tribunal (Immigration and

[127] Tribunals Courts and Enforcement Act 2007, s. 11.

[128] Tribunal Procedure (Upper Tribunal) Rules 2008, r. 21(2).

Asylum Chamber) (as for the Employment Appeal Tribunal for instance) was sufficient. Having a single permission stage for appealing to the Upper Tribunal (Immigration and Asylum Chamber) would save on judicial and other resources and reduce delay that it is evident that the present structure can contribute to.

6.11 The Working Party was unable to reach a final conclusion on whether the permission stage in the First-tier Tribunal (Immigration and Asylum Chamber) should be abolished. In favour of abolition are the delay and cost associated with the current process. The assumption must be that in the absence of the First-tier Tribunal (Immigration and Asylum Chamber) filter, the Upper Tribunal (Immigration and Asylum Chamber) will correctly identify all cases in which permission should be granted. Importantly, as above, in most cases appellants refused permission to appeal by the First-tier Tribunal (Immigration and Asylum Chamber) renew their application to the Upper Tribunal (Immigration and Asylum Chamber).

6.12 Against abolition is the uncertainty whether all cases currently granted permission by the First-tier Tribunal (Immigration and Asylum Chamber) would also be granted permission by the Upper Tribunal (Immigration and Asylum Chamber) had there been only one permission stage. There is also the value at the next level of having the views on the case of an additional judge. Advocates are also in a better position to tailor their application to the Upper Tribunal (Immigration and Asylum Chamber) having seen the view of a First-tier Tribunal (Immigration and Asylum Chamber) judge refusing permission to appeal. Abolition might also lead to an increase in *Cart* judicial review applications, which the Working Party views as undesirable. If abolition were to lead to a right of oral renewal of a permission application in the Upper Tribunal, this would be likely to lead to a very significant increase in the Upper Tribunal's workload and the overall result would be to extend the current timescales within which applications for permission are dealt with.

Dealing efficiently with obviously wrong decisions

6.13 Decisions of the First-tier Tribunal (Immigration and Asylum Chamber) which are patently wrong in law - for example, involving an error of law or a breach of the rules of natural justice - should be dealt with quickly. There is power under rule 35 of the Tribunal Procedure Rules for judges of the First-tier Tribunal (Immigration and Asylum Chamber), who are considering applications for permission to appeal to the Upper Tribunal (Immigration and Asylum

Chamber), to exercise the power of review in such cases.[129] The matter is then reheard in the First-tier Tribunal (Immigration and Asylum Chamber).

6.14 For some reason this power does not seem to be exercised, with the First-tier Tribunal (Immigration and Asylum Chamber) judge simply giving permission to appeal and the case then proceeding to the Upper Tribunal (Immigration and Asylum Chamber). The benefit of First-tier Tribunal (Immigration and Asylum Chamber) judges exercising their rule 35 power can be immediately appreciated. Instead of permission being granted and the case then listed for hearing in the Upper Tribunal (Immigration and Asylum Chamber), where the Upper Tribunal (Immigration and Asylum Chamber) judge is almost bound to find an error of law and remit the case to the First-tier Tribunal (Immigration and Asylum Chamber), that end result will be achieved by a single process, without the case leaving the First-tier Tribunal (Immigration and Asylum Chamber). Appropriate guidance and training may be necessary so that judges identify cases where review, set aside and re-making will be appropriate.

6.15 The Working Party considers that determinations of the First-tier Tribunal (Immigration and Asylum Chamber) which are obviously wrong should be expeditiously dealt with by the First-tier Tribunal (Immigration and Asylum Chamber) itself without sending them on appeal to the Upper Tribunal (Immigration and Asylum Chamber). We understand that the First-tier Tribunal (Immigration and Asylum Chamber) is addressing this issue: judicial training is in place and a new Practice Statement is to be issued by the Senior President of Tribunals. We welcome these developments.

Remitting cases for re-hearing or re-making the decision

6.16 If permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) is granted by either the First-tier Tribunal (Immigration and Asylum Chamber) or the Upper Tribunal (Immigration and Asylum Chamber) itself, the case proceeds to appeal. If the Upper Tribunal (Immigration and Asylum Chamber) then identifies an error of law justifying setting aside the decision, it must either remit the case to the First-tier Tribunal (Immigration and Asylum Chamber) or re-make the decision. Appellants whose cases are re-made in the

[129] Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, Rule 35.

Upper Tribunal (Immigration and Asylum Chamber) face a stricter second-appeals test if their case is then refused and they appeal to the Court of Appeal rather than where their case is remitted back to the First-tier Tribunal (Immigration and Asylum Chamber), where an appeal to the Upper Tribunal (Immigration and Asylum Chamber) could again be brought on any point of law. However, the Court of Appeal has held that this does not justify remitting cases to the First-tier Tribunal (Immigration and Asylum Chamber).[130]

6.17 If the decision is set aside the usual approach will be for the Upper Tribunal (Immigration and Asylum Chamber) to re-make the decision itself rather than remitting the appeal to the First-tier Tribunal (Immigration and Asylum Chamber). The exceptions are if to re-make the decision would deprive a party of a fair hearing or deprive the other the opportunity to put their case, or if further fact-finding by the First-tier Tribunal (Immigration and Asylum Chamber) is appropriate.[131] Although the presumption is that decisions will be re-made, feedback from Working Party members indicated that the number and proportion of cases remitted to the First-tier Tribunal (Immigration and Asylum Chamber) has risen significantly, whilst the number and proportion of cases allowed (outright) has fallen.

6.18 We accept that it will be appropriate for the Upper Tribunal (Immigration and Asylum Chamber) to remit some cases to the First-tier Tribunal (Immigration and Asylum Chamber) where there is an error of law. However, we note that the remittal rate has been rising over the years. Remittal of cases which could be remade in the Upper Tribunal (Immigration and Asylum Chamber) is bad case management and a cause of yet further delay. Moreover, despite the presumption in the standard directions that the Upper Tribunal (Immigration and Asylum Chamber) will re-make decisions if an error of law is found, practitioners have informed us that they are unable to distinguish in practice between cases where the Upper Tribunal (Immigration and Asylum Chamber) is genuinely likely to re-make a decision and cases where it will not. That can

[130] *JD (Congo) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 327, para. 38.

[131] Practice Directions, Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, amended 13 November 2014, paras. 3.1 and 7; Upper Tribunal, Final Directions, 3 May 2016, para. 4.

cause unnecessary work on their part. Parties need to know when cases are genuinely likely to be re-made, and the exceptions in the practice directions when cases will be remitted must be applied consistently. This may be an issue of judicial training.

6.19 The Working Party considers that the Upper Tribunal (Immigration and Asylum Chamber) should (a) address the high remittal rate of cases to the First-tier Tribunal (Immigration and Asylum Chamber) for it to re-make the decision; and (b) forewarn representatives if there is a known prospect that the Upper Tribunal (Immigration and Asylum Chamber) will re-make a decision and not remit the case.

Judicial review in the Upper Tribunal

6.20 Permission to apply for judicial review must first be sought on the papers. If refused, but not deemed to be 'totally without merit', the application for permission may be renewed orally. If permission is granted, the case proceeds to a hearing. A striking feature is that relatively few cases succeed. Figures for 2016/17 show that of the 10,191 immigration and asylum judicial review permission applications decided by the Upper Tribunal (Immigration and Asylum Chamber) on the papers, only eight percent were successful (with 22 percent being deemed 'totally without merit').[132] Of the 2,693 applicants who renewed their permission application orally, 22 percent were successful; and of the 267 cases which then proceeded to a substantive hearing – the remaining cases granted permission being either settled or withdrawn – 28 percent were successful.[133]

6.21 Another striking feature about judicial reviews in immigration and asylum matters is their sheer volume. The number has markedly increased over the years, rising from 2,151 permission applications in 2000 to closer to 18,000

[132] There was a marked increase in applications deemed 'totally without merit' in 2015/16 before numbers fell back: see R. Thomas, *Immigration Judicial Reviews in the Upper Tribunal (Immigration and Asylum Chamber): an analysis of statistical data* (Revised May 2016). Tribunals and Gender Recognition Statistics Quarterly: October to December 2017: Main Tables, UIA.3.

[133] Tribunals and Gender Recognition Statistics Quarterly: October to December 2017: Main Tables, UIA.3.

immigration judicial reviews in 2015/16.[134] This compares to only 1,817 non-immigration judicial reviews (for 2016), a figure that has remained relatively static over the years.[135] The increase in volume of immigration judicial reviews in the Upper Tribunal (Immigration and Asylum Chamber) and Administrative Court inevitably has led to an increase in the volume of applications to the Court of Appeal for permission to appeal and appeal hearings.

6.22 The figures may be falling back from their peak. In 2016/17, the figure was closer to 15,000 judicial review permission applications lodged in the High Court and Upper Tribunal (Immigration and Asylum Chamber).[136] Based on figures for the start of the year, the volume of immigration judicial review permission applications for 2017/18 look likely to be closer to 12,000.[137] We understand that in the Court of Appeal there has been a corresponding decrease.

6.23 The sheer volume of immigration and asylum judicial reviews, the failure of the bulk of them, and the high number which judges regard as totally without merit, have been a cause for concern within government and the courts for some time. The objective of Part 4 of the Criminal Justice and Courts Act 2015 was to deter judicial review proceedings which are abusive. Permission or relief can be refused if it appears to the court to be highly likely that the outcome for the

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[134] The figures are found in two databases which do not cover the same periods. The Civil Justice and Judicial Review Tables, July to September 2017, contain figures for all judicial review permission applications lodged in the Administrative Court. This gives the number of immigration judicial review permission application lodged in the Administrative Court in 2015 as 2,669, of which 79 were then transferred to the Upper Tribunal. The Tribunals and Gender Recognition Statistics Quarterly, July to September 2017, Table UIA.1, contains the numbers of judicial review permission applications received by the Upper Tribunal; the figure for 2015/16 is 15,727.

[135] Civil Justice and Judicial Review Tables; July to September 2017.

[136] Ministry of Justice, Civil Justice and Judicial Review Tables, October to December 2017, Table 2.1: 2,485 immigration judicial review permission applications lodged in the High Court in 2016 of which 55 then transferred to the Upper Tribunal. Tribunals and Gender Recognition Statistics Quarterly, October to December 2017, Table UIA.1: 13,372 judicial review permission applications lodged in the Upper Tribunal in 2016/17.

[137] Civil Justice and Judicial Review Tables, October to December: 2,254 immigration judicial review permission applications lodged in the High Court in 2017 of which 37 then transferred to the Upper Tribunal. Tribunals and Gender Recognition Statistics Quarterly, October to December 2017, extrapolated from Table UIA.1: 7,676 judicial review permission applications lodged in the Upper Tribunal in the first three quarters of 2017/18.

applicant would not have been substantially different if the conduct complained of had not occurred. Other changes have meant that if applications are ordered as totally without merit, these may not be renewed at an oral hearing.[138] It may be that these measures are not being applied in appropriate cases.

6.24 The Working Party considers that a substantial driver behind the increase in the volume of judicial reviews is the lack of statutory appeal rights. However, the reality is that given the stakes involved, and the advantages in delaying removal from the UK, claimants will pursue every potential avenue, regardless of the legal merits of their case. Thus the volume of judicial reviews. If judicial review remains an option open, applicants will pursue it, possibly on more than one occasion, along with other options.[139]

6.25 One way to reduce judicial reviews is to reduce the need. If our recommendations for earlier stages to identify deserving cases first time are implemented, the number of judicial reviews may reduce. The Home Office raised with us how they are subject to judicial reviews where legal representatives issue relatively pro-forma applications with no arguable grounds.[140] Our recommendations regarding incompetent and unethical solicitors and other legal representatives are a partial response to this.

Age Assessments

6.26 Judicial review of age assessments by local authorities on behalf of disputed minors applying for asylum are lodged in the Administrative Court but transferred, if permission is granted, to the Upper Tribunal (Immigration and Asylum Chamber). The volume of such cases is relatively low with, for instance, only 20 applications in 2016. Of those, all but three were granted permission and the case transferred.[141] Although the number of cases is small,

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[138] Civil Procedure (Amendment No 4) Rules 2013.

[139] However, we note that the costs of bringing a judicial review may limit the ability of some claimants to pursue this option. See R. Low-Beer and J. Tomlinson, *Financial Barriers to Accessing Judicial Review: An Initial Assessment* (Public Law Project, 2018).

[140] See also the Independent Chief Inspector of Borders and Immigration Report, *An inspection of the Home Office's mechanisms for learning from immigration litigation* (HMSO, 2018), para. 3.23, for more on the high percentage of JR claims refused at Paper and Oral Hearings.

[141] Extracted from Ministry of Justice, Civil Justice and Judicial Review data in Civil Justice statistics quarterly: January to March 2017 and Royal Courts of Justice Tables 2016.

cases typically last between 3 and 5 days in the Upper Tribunal (Immigration and Asylum Chamber) because of oral evidence from expert witnesses. Although they only account for a very small fraction of the volume of cases in the Upper Tribunal (Immigration and Asylum Chamber), discussion within the Working Party suggests that they account for a disproportionate amount of time spent on substantive judicial reviews.

6.27 One solution with age assessments is that in appropriate cases the Upper Tribunal (Immigration and Asylum Chamber) should deal with expert evidence on the papers alone. To save on the unnecessary duplication of work and delay the Working Party concluded that it made sense for the permission stage in age assessments cases to be dealt with in the Upper Tribunal (Immigration and Asylum Chamber). Further, we took the view that the age assessments may be better dealt with in a fact-finding forum with appropriate expertise, such as a Family Court, rather than in the Upper Tribunal (Immigration and Asylum Chamber).

6.28 Consideration should be given to judicial reviews of local authority decisions on age assessments of disputed minors applying for asylum (a) being allocated to the Upper Tribunal (Immigration and Asylum Chamber) rather than the Administrative Court; (b) with expert evidence addressed on the papers unless the tribunal directs to the contrary.

Court of Appeal

6.29 Appeals can be taken to the Court of Appeal from a decision of the Upper Tribunal (Immigration and Asylum Chamber) on a statutory appeal from the First-tier Tribunal (Immigration and Asylum Chamber). The application must meet the second appeals test in that either it would have a real prospect of success and raise an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear it. The second appeals threshold is high. The compelling reason limb is not whether the consequences may be severe if its factual basis is established.[142] Permission to appeal in such cases may be given by the Upper Tribunal (Immigration and Asylum Chamber) or the Court of Appeal.

[142] *PR (Sri Lanka) v Secretary of State for the Home Department (Practice Note)* [2011] EWCA Civ 988; [2012] 1 WLR 73.

6.30 With judicial review, either party may appeal against a decision of the Upper Tribunal (Immigration and Asylum Chamber), either refusing permission to apply for judicial review or deciding the substantive judicial review application itself. This is either with the permission of the Upper Tribunal (Immigration and Asylum Chamber) or, if refused, with that of the Court of Appeal. It is not open to the Court of Appeal to grant permission to apply for judicial review. Without a change in the rules, which may require legislation, it can only give permission to appeal. If the case proceeds to a hearing at that point permission to apply for judicial review can be granted. The first appeals test must be met: the appeal must have a real prospect of success, or there must be some other compelling reason for it to be heard.[143]

6.31 Appeals from the Upper Tribunal (Immigration and Asylum Chamber) made up around 26 percent of all appeals filed in the Court of Appeal in 2016.[144] This is an increase in proportion compared with recent years (2007-2015).[145] To assist with the backlog of permissions to appeal in immigration and asylum cases, the Court of Appeal has appointed a number of retired High Court judges with experience of the work to assist. The Working Party does not consider that this practice is ideal in the longer term.

6.32 Immigration and asylum applications for permission to appeal in the Court of Appeal (both statutory and judicial review appeals) have risen massively in the last few years, from 1,324 in 2013/14 to 2,143 in 2016/17. In December 2017, immigration and asylum permission to appeal applications accounted for 49 percent of all permission applications in the Court of Appeal. By contrast, applications for permission to appeal following a substantive judicial review in the Upper Tribunal (Immigration and Asylum Chamber) or Administrative Court are, we understand, relatively modest in number (around 40 cases in 2016).[146] A study by Dame Hazel Genn and Nigel Balmer for the report by Lord Briggs on the Civil Courts Structure Review found that in 2015 over 40 percent

[143] See *Nwankwo & Anor v Secretary of State for the Home Department* [2018] EWCA Civ 5.

[144] Ministry of Justice, Civil Justice Statistics Quarterly - January to March 2017, The Royal Courts of Justice Tables 2016, Table 3.9.

[145] *Ibid.*

[146] Civil Appeals Office.

of paper applications in the Court of Appeal for permission to appeal were immigration and asylum applications.[147]

Permission in the Upper Tribunal

6.33 We understand that the Upper Tribunal (Immigration and Asylum Chamber) grants only a small number of permission applications to the Court of Appeal. A significant number are then renewed to the Court of Appeal, which grants permission to a more substantial number. We considered whether for this reason the process of applying to the Upper Tribunal (Immigration and Asylum Chamber) for permission to appeal to the Court of Appeal was unnecessary and could be removed, but decided that each determination by an Upper Tribunal (Immigration and Asylum Chamber) judge is useful information for the Court of Appeal judge considering the matter later.

6.34 As a result of amendments in 2013 and 2014, where the Upper Tribunal (Immigration and Asylum Chamber) refuses permission to bring immigration judicial review proceedings, or refuses to admit a late application, and considers the application to be totally without merit, the applicant may not request the decision to be reconsidered at a hearing.[148]

Permission in the Court of Appeal

6.35 Since 3 October 2016, the Court of Appeal in considering permission applications from the Upper Tribunal (Immigration and Asylum Chamber) deals with these on the papers alone unless the judge considering the application directs otherwise.[149] Appellants before that date have a right to an oral renewal unless the application is deemed to be totally without merit.

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[147] H. Genn and N. Balmer, *Court of Appeal: Time and Motion Data Analysis* (UCL Judicial Institute, 2016) reported in Briggs LJ, *Civil Courts Structure Review: Final Report* (2016), Annex 4, Section 5, p. 219.

[148] Tribunal Procedure (Upper Tribunal) Rules 2008, r. 30(4A).

[149] CPR 52.5(1), 54.7A(8).

Limiting permission applications

6.36 It would be unsurprising that there were not serious concerns about the volume in the Court of Appeal of applications for permission to appeal in immigration (and asylum) permission matters and, to a lesser extent, about the number of substantive appeals. So many of these are unmeritorious applications. This has placed pressure on the court's limited resources and led to delays in the court's work not only in this but other areas as well.

6.37 The Working Party considered whether the right of appeal from the Upper Tribunal (Immigration and Asylum Chamber) to the Court of Appeal should be curtailed. One proposal considered was that the right of appeal in cases ordered by the Upper Tribunal (Immigration and Asylum Chamber) as totally without merit (i.e. bound to fail) should be abolished unless certified as raising a point of law of public importance. (A case can be bound to fail because of binding authority, but that might be a case certified because of the importance of the point of law involved.) Another proposal was that a case would only go to the Court of Appeal if the Upper Tribunal (Immigration and Asylum Chamber) certified that it raised a point of law of public importance. Both proposals would reduce the volume of applications before the Court of Appeal, prevent misuse of the system by those who see an advantage in the delay caused by bringing unmeritorious challenges, and make better use of judicial resources.

6.38 One safeguard would be that a refusal to certify would be reviewed (on the papers) by a more senior judge, possibly the President of the Upper Tribunal (Immigration and Asylum Chamber), a vice-presidential member or a visiting High Court judge. Another would be that, as with *Cart* judicial reviews, there would remain the right to judicially review the certification in the High Court.

6.39 The majority of the Working Party rejected these proposals for change on the grounds that the right to seek permission to appeal to the Court of Appeal was an essential safeguard given the, albeit small, number of cases, including those the Upper Tribunal (Immigration and Asylum Chamber) has ordered as totally without merit that have succeeded on appeal. Reference was made to a number of recent cases where the Court of Appeal or Supreme Court had changed the law, affecting many others, in what until these decisions would have been considered as hopeless appeals: *Qadir*,[150] where fraud was alleged by the Home

[150] *Qadir v Secretary of State for the Home Department* [2016] EWCA Civ 1167.

Office in respect of English language tests; *Kiarie*,[151] where foreign national offenders challenged their deportation on human rights grounds, but since their claims were certified would have had only an out of country hearing; and *MK (Pakistan)*,[152] concerning the appeal rights of extended family members of EU nationals.

[151] *Kiarie and Byndloss, supra.*

[152] *Khan v Secretary of State for the Home Department* [2017] EWCA Civ 1755.

VII. CONCLUSION AND RECOMMENDATIONS

7.1 The Working Party's recommendations are based on the need for a system of immigration and asylum appeals which is fit for the purpose of making lawful, timely and just decisions. That is in a context where many of those making claims are vulnerable, often with complex needs, which may be exacerbated by a lengthy and stressful process. At the same time, delays in the system mean that some whose claims have insufficient legal merit, stay in the UK for longer than would otherwise be the case.

7.2 The need for improved communication between the different parties involved emerged as a clear theme throughout our work. We make several recommendations designed to achieve this. At one level our concern is that there needs to be better communication at the pre-appeal stages up to the time of a hearing so that the Home Office is able to review and, if appropriate, withdraw a decision. That way issues can be narrowed and unnecessary hearings avoided. At another level we have recommended that communication between the parties involved in immigration and asylum appeals would be furthered through the Immigration and Asylum Chambers convening informal discussions between the different parties involved in the process on a regional and national basis.

7.3 Our inquiry was prompted in large part by the HMCTS Reform Programme for the courts and tribunal service, which involves significant investment and is aimed at the modernisation and digitisation of the system. The Reform Programme is complemented by Home Office projects to improve initial decision-making, with the aim of reducing the number of unnecessary appeals. We welcome both sets of initiatives and endorse a great deal of what is proposed.

7.4 From the outset of its inquiry the Working Party was struck by the procedural problems facing the First-tier Tribunal (Immigration and Asylum Chamber) in handling immigration and asylum appeals. Despite the commitment of its judges and staff, there are delays in hearing appeals, insufficient case management, non-compliance with the tribunal's rules and directions, cases progressing slowly and being unjustifiably drawn out, and unnecessary hearings. Many of these problems were identified by the 2014 Fundamental Review. Unfortunately, the majority of its recommendations have not yet been implemented. We have identified a need for a culture change in the First-tier Tribunal (Immigration and Asylum Chamber), in which existing practices are re-examined in the light of its Overriding Objective that cases be dealt with

fairly and justly. The main objective of this culture change should be that all parties work towards narrowing the issues at the earliest possible stage.

7.5 To an extent, what we say about the First-tier Tribunal (Immigration and Asylum Chamber) applies to the Upper Tribunal (Immigration and Asylum Chamber) as well. It is working under considerable pressures with the number of appeals from the First-tier Tribunal (Immigration and Asylum Chamber) and the volume of applications for judicial review. In turn there is a knock-on effect, placing pressure on the Court of Appeal caused by the number of applications for permission to appeal. We make a number of recommendations which we believe will assist in the work of the Upper Tribunal (Immigration and Asylum Chamber). As to further appeals, the majority of the Working Party was content with the current arrangements, in light of the steps the Court of Appeal has itself taken in recent times to reduce the challenges which those with meritless applications can bring with their permissions to appeal. Our expectation is that the adoption of our recommendations for the earlier stages of the process will have an impact on reducing the number of onward appeals, in turn reducing the pressure with appeals.

7.6 During the course of our inquiry, we were troubled by examples we encountered of unsupervised and unqualified persons giving advice and assistance on immigration matters, representatives who had exploited vulnerable clients, and those who were incompetent and, in a few cases, dishonest. These legal practitioners and immigration advisers undermine the reputation of the diligent, competent and highly dedicated representatives and that of the justice system more generally. The SRA and the OISC have increased their efforts to investigate such cases. Serious problems still exist with the regulation of legal advice and assistance in this area. We take the view that the Immigration and Asylum Chambers must systematically collect information about practitioners considered to provide poor quality representation, as well as the outcome of cases and cases certified as totally without merit. They should call advisers and practitioners to account and, in appropriate cases, refer them to the appropriate regulatory body. Legal professionals and judges must support this work by reporting instances of unacceptable advice and representation.

7.7 Our report comes at a time of significant reform to the justice system. The Reform Programme presents an opportunity to improve the processes in the Immigration and Asylum Chambers as they deal with immigration and asylum matters so that bad practice is not embedded in the new system. As we have said, we support much of what the Reform Programme seeks to achieve. We

do have concerns about video-conferencing and the use of virtual hearings. Our overall approach is that change should proceed by stages, with testing and research prior to moving to the next stage. We trust that our recommendations offer a framework for improvements in the system, to the benefit of appellants and their representatives, the Home Office, and the machinery of justice - the tribunals and courts - as they handle some of the most difficult issues our system of justice faces.

Recommendations

Introduction

1. There should be informal and regular meetings at regional level to discuss the processes in the Immigration and Asylum Chambers, convened and chaired by local resident judges, and attended by lawyers and immigration advisers, HMCTS and the Home Office. At a national level there should be bi-annual meetings of the judicial chairs of these meetings, together with ILPA, those from other organisations whose members provide legal advice and assistance to appellants, and the Home Office.

Home Office Refusal Decisions

2. The online appeals system introduced by the Reform Programme should prompt appellants to upload all relevant evidence with their appeal, where available, at the time the appeal is lodged. The system should indicate what evidence will be relevant and prompt appellants to upload that evidence.

3. Minded to refuse letters should: be extended to all immigration cases; set out in plain English their purpose and how to obtain legal support to respond; give appellants and their legal representatives sufficient time to respond, make representations, and provide any further evidence; be considered conscientiously and open-mindedly by the Home Office decision maker.

The Appeal Process

4. HMCTS should proceed with caution in its implementation of the Reform Programme in the Immigration and Asylum Chambers, testing each advance thoroughly, introducing each change incrementally and carefully monitoring outcomes before proceeding to introduce the next change.

5. Following extensive stakeholder consultation, HMCTS should design the online Immigration and Asylum Chambers' system to accommodate the needs of the most vulnerable litigant in person.

6. HMCTS should take into account the recommendations of JUSTICE's *Preventing Digital Exclusion from Online Justice* Working Party report.

7. The experience of charities and agencies which offer support services to asylum seekers and migrants should be drawn upon in the development of assisted digital services.

8. HMCTS should put contingencies in place to ensure that an appellant who is unable to comply with a deadline because of the additional delay of having to use assisted digital services is not disadvantaged.

9. HMCTS should work with the Tribunal Presidents to develop guidance for judges dealing with applications for an extension of time where delay has been caused by the time taken to get assistance in submitting the appeal online.

10. All frontline staff providing assisted digital services should be given training to understand the importance of explaining to users that they cannot provide legal assistance and signpost to organisations that can provide legal or practical advice or services as appropriate.

11. Any online interface should contain the facility for materials to be electronically translated into the main languages of the users of the Immigration and Asylum Chambers and retranslated into English by using approved software.

12. Appropriate IT facilities should be provided in detention and in, or near, National Asylum Support Service accommodation.

13. Safety nets should be introduced to deal with online system errors.

14. UK Visas and Immigration's assisted digital service should be extended to those applying for entry clearance from abroad.

15. HMCTS' assisted digital services should be extended to out-of-country appellants in so far as possible.

16. HMCTS should collect data on outcomes of digital and non-digital appeals to monitor relative disadvantage. Any disadvantage should be explained at the outset and an alternative (non-digital) appeal option be offered. Judges should have the discretion to direct non-digital hearings whenever they consider appropriate.

17. The HMCTS website should be clear as to who has the responsibility of uploading the document. The onus should be on the Home Office to upload any documents that the appellant has already provided to them.

18. Digital document upload should be structured in a way which ensures that bundles are presented in an orderly and focussed manner.

19. The paper appeal option should be explained to appellants at the outset and reassurance given that any information submitted online will be treated in the strictest confidence.

20. The strongest safeguards against hacking of data should be put in place, including a precautionary high level of protection of information in all cases which could be required to be anonymised on grounds such as feared persecution or ill-harm.

21. Appellants should be informed that online appeals and telephone support cannot be guaranteed as safe in protection-related cases and should be assisted to use paper channels if they so choose.

22. HMCTS should put strong identity verification checks in place to ensure legitimate access, and give particular thought to how to prevent impersonation when recovering lost passwords and/or login details.

23. All Home Office communications should indicate a clear and effective point of contact and contact details for each case, and at each stage.

24. Developing specialisms for Home Office senior caseworkers authorising concessions could allow the senior caseworker to have an in-depth knowledge of the country from which the appellant hails and may be an improvement on the current system.

25. Home Office presenting officers should always consider fresh evidence and arguments and address whether a case should be conceded and be prepared to withdraw resistance to an appeal including on the day of a hearing. This should

be accompanied by effective channels of communication with the senior presenting officer authorising the concession.

26. We recommend that regulatory bodies tighten requirements for firms/practitioners regarding the training and supervision of unqualified caseworkers and immigration advisers.

27. The SRA's and the OISC's efforts to investigate cases of incompetent and dishonest legal assistance should be bolstered by legal representatives reporting such cases to the regulatory body.

28. In addition to the greater use of the *Hamid* procedure, the Immigration and Asylum Chambers should collect and record information on a systematic basis about practitioners considered to provide poor quality service, the outcome of cases and cases certified as totally without merit.

29. Following the introduction of the Reform Programme, HMCTS should investigate the idea of providing easily accessible information on immigration and asylum legal practitioners.

Appeals to the First-tier Tribunal

30. The 2014 Fundamental Review recommendation of pre-appeal hearing reconsideration should be piloted, and if successful, introduced.

31. Ongoing consideration should be given to the qualifications, training and powers conferred upon tribunal case workers.

32. Accessible audio and video guides for appellants should be created, which should be available online and at hearing centres.

33. There should be more interchange between tribunal hearing centres through measures such as peer observation.

34. There should be enhanced judicial training to promote a greater consistency of approach and to take account of digital working.

35. The Reform Programme should take into account the need to safeguard vulnerable users, as well as the provisions in the Joint Presidential Guidance Note, in its development of digital processes.

36. Consideration should be given to a culture change in the First-tier Tribunal (Immigration and Asylum Chamber), consisting of: an enhanced emphasis on case management; a greater flexibility in the use of judicial resources; an expectation of discipline in the enforcement of rules and practice directions, including time limits for submission of evidence; restrictions as to the length of written grounds of appeal; and appropriate rigour as to the extent to which grounds of appeal can be amended.

37. The First-tier Tribunal (Immigration and Asylum Chamber), where appropriate, should make wasted costs orders for non-compliance with the rules and judicial orders and directions. This power should be exercised even-handedly between appellants and the Home Office.

38. The Fundamental Review recommendation for the delivery of oral judgments where appropriate, which should be properly recorded, should be implemented following the First-tier Tribunal's (Immigration and Asylum Chamber) pilot. The transcribed version of the oral determination should be accessible to the parties. Training should be given to judges in delivering judgments orally.

39. All hearings before all tribunals, including virtual hearings and telephone hearings, should be recorded and the recording securely retained.

40. Determinations should be accessible to appellants via a secure portal.

Hearings in the First-tier Tribunal

41. Judges should retain the discretion to order that video-conferencing or a virtual hearing not take place and that proceedings occur in the traditional way.

42. It should be made clear to appellants and witnesses what will happen to the recording and data generated; whether the decision will be publicly accessible; and how privacy will be upheld in the process of delivering the decision.

43. We do not recommend the wholesale use of video-conferencing in immigration and asylum hearings without further research. However, we recommend that in addition to bail proceedings, video-conferencing be used initially in a limited number of circumstances where it can be subject to monitoring and research. Such hearings include case management hearings; cases in which the parties are agreed, subject to the Tribunal ruling that video conferencing is inappropriate; cases in which the appellant is not present and the Tribunal rules

that it would be fair and just for a video conferencing to occur; and out-of-country appeals from a controlled location and only insofar as they are human rights compliant.

44. Video-conferencing for substantive appeals should be introduced only after the above initial procedures are shown to be successful, and further research and piloting establishes that effective communication is possible between the claimant/appellant and their representative; that representative and the Home Office presenting officers; and the judge and all parties. Its introduction should occur in stages, with monitoring and evaluation at each stage. Appellants and witnesses should give evidence from a controlled location to facilitate better judicial supervision and minimise the risks of coaching or coercion.

45. Initially, virtual hearings should only be used for: (1) case management hearings; (2) cases in which the parties are agreed, subject to the Tribunal ruling that a virtual hearing is inappropriate; (3) cases in which the appellant cannot be present and the Tribunal rules that it would be fair and just for a virtual hearing to occur, including out-of-country appeals (from a controlled location).

46. HMCTS should conduct a study looking at the impact of video conferencing where it is used in court proceedings in the UK and in other jurisdictions.

Appeals to the Upper Tribunal, Judicial Review and the Court of Appeal

47. Determinations of the First-tier Tribunal (Immigration and Asylum Chamber) which are obviously wrong should be expeditiously dealt with by the First-tier Tribunal (Immigration and Asylum Chamber) itself without sending them on appeal to the Upper Tribunal (Immigration and Asylum Chamber).

48. The Upper Tribunal (Immigration and Asylum Chamber) should (a) address its high remittal rate to the First-tier Tribunal (Immigration and Asylum Chamber) for the retaking of decisions, as opposed to re-making the decision itself; and (b) forewarn representatives if there is a known prospect that the Upper Tribunal (Immigration and Asylum Chamber) will remake a decision and not remit the case.

49. Consideration should be given to judicial reviews of local authority decisions on age assessments of minors applying for asylum at the permission stage (a) being allocated to the Upper Tribunal (Immigration and Asylum Chamber) not the Administrative Court; with (b) expert evidence addressed on the papers

unless the tribunal directs to the contrary. Age assessments may be better dealt with in a fact-finding forum with appropriate expertise, such as a Family Court, rather than in the Upper Tribunal (Immigration and Asylum Chamber).

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