
# Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal

## JUSTICE consultation response

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## Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system in the United Kingdom. It is the UK section of the International Commission of Jurists. Established in 1957, our vision is of fair, accessible and efficient legal processes, in which the individual's rights are protected, and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This briefing responds to the Ministry of Justice's consultation on proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal (the "Consultation").

3. In 2018 JUSTICE published a Working Party report *Immigration and Asylum Appeals: A Fresh Look*[1] which considered ways in which the immigration and asylum appeals process could be improved, including rights of appeal. Our working party report *Solving Housing Disputes* in 2020 examined housing dispute resolution, including appeals in the Property and Lands Chambers.[2] JUSTICE also recently published a response[3] to the Government's Independent Review of Administrative Law ("IRAL"), the Terms of Reference of which included consideration of rights of appeal.[4] In addition, JUSTICE has an ongoing working party which is looking at the benefits system, including benefits appeals.[5] Drawing on this work we have set out below our response to the relevant questions posed in the Consultation.

4. We recognise the additional pressure that dealing with permission to appeal applications from judicial review permission refusals and second appeals places on the court's limited resources and the potential to cause delays. That is why in October 2016 the Civil Procedure Rules were amended to remove the right to oral renewal of permission to appeal if permission is refused on the papers.[6] This has already significantly lessened the Court of Appeal's workload and reduced delays, with the mean and median weeks for

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[1] JUSTICE, *Immigration and Asylum Appeals: A Fresh Look* (2018), available at https://justice.org.uk/wp-content/uploads/2018/06/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf

[2] JUSTICE, *Solving Housing Disputes* (2020), available at https://justice.org.uk/wp-content/uploads/2020/03/Solving-Housing-Disputes-report.pdf

[3] JUSTICE, *The Independent Review of Administrative Law Call for Evidence- Response* (October 2020), available at https://justice.org.uk/wp-content/uploads/2020/10/JUSTICE-response-to-IRAL-October-2020.pdf

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf

[5] https://justice.org.uk/our-work/civil-justice-system/current-work-civil-justice-system/reforming-benefits-decision-making/

[6] CPR 52.5

permission to appeal[7] Whilst we appreciate that it is important to ensure that justice is delivered as quickly as possible, the strive for rapid justice must not be pursued at the expense of access to justice.

**Q1: Do you agree that there should be a stricter and narrower test applied to applications to the Court of Appeal for permission to appeal in a second appeal from the Upper Tribunal to the Court of Appeal?**
**Q2: Do you agree with the proposal to amend the current test so that it requires the application to demonstrate that it raises matters of exceptional public interest? Please give reasons.**

5. JUSTICE cannot support the proposal to restrict the second appeals test applied by the Court of Appeal. As the Consultation states, efficiency must be balanced with fairness and access to justice. Whilst the case for efficiency has been made, we are concerned that the impact on access to justice has not been given sufficient analysis or weight. We do not consider that a strong case has been made out that the changes proposed would cause the efficiencies desired within the system. However, we do consider that, in the attempt, a significant safeguard would be lost.

**Disparity of approach between civil court and the tribunals**

6. Our first concern is the disparity of approach between litigants. The current second appeals test in the tribunals is shared by the civil courts.[8] As such, both litigants in the county court and those in a First Tier Tribunal (FTT) have the same protection against judicial error at the point of a second appeal.

7. The proposed changes will put private litigants, organisations and governmental departments who litigate in the tribunals at a significant disadvantage to those in the civil courts. Those tribunal litigants will lose the Court of Appeal's consideration of whether their case passes the current second appeals test, i.e. if it has a real prospect of success and raises an important point of principle or practice; or there is some other compelling reason for the Court of Appeal to hear it.

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[7] Ministry of Justice, 'Royal Courts of Justice Annual Tables – 2019 (2020), Table 3.10, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890424/civil-Justice-stats-main-tables-Jan-Mar.xlsx.

[8] Rule 52.7 of The Civil Procedure Rules 1998

8. The point of there being a Court of Appeal consideration-stage to this second appeal test is as simple as it is vital: it ensures against judicial error when an appeal application is considered. JUSTICE does not consider potential judicial error among Upper Tribunal Judges considering the second appeals test is any more or less likely than the potential judicial error of Designated Civil Judges considering the same test in the civil courts. As such, JUSTICE considers that the proposal would disadvantage a certain cohort of litigants' access to appeal not due to the merit of their case but due to the venue in which it has been brought. Such measures cannot be in the interests of justice.

**Inefficiencies**

9. We have further concerns about disincentives and inefficiencies this change would create within the lower courts.

10. **Cross-ticketing pilots and coordination in housing disputes:** Creating two different appeal schemes for the civil courts and tribunals may have additional consequences to the ways the jurisdictions have sought to collaborate. One particular example is when claims cross jurisdictional lines between the FTT (Property Chamber) and the County Court. Since the end of 2016, some of these have been subject to the Residential Property Deployment of Judges Pilot. By this process, proceedings commenced in the County Court are transferred to the FTT (Property Chamber) or alternatively, a judicial case management decision is made to deploy a judge, who is both an FTT judge and County Court judge, to hold a hearing in which all aspects of a single dispute (which traverses jurisdictional lines) are solved.[9]

11. JUSTICE considers such cross-ticketing to be highly desirable to improve the current housing disputes landscape.[10] The ability for the judiciary to hear disputes in one forum promotes access to justice by reducing the confusion where claims cross jurisdictional lines, as well as promoting collegiality, knowledge and up-skilling across the bench.

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[9] Amendments to the County Courts Act 1984 and provisions of the Tribunals Court and Enforcement Act 2007 (TCEA) mean that FTT judges are now also judges of the County Court and vice versa. Crossticketing under the TCEA goes beyond property law and is intended to be part of a broad shift across the judiciary, to "enable the flexible deployment of judiciary to meet fluctuations in workloads and encourage greater consistency of standards and approach across previously disparate jurisdictions", House of Commons Hansard Ministerial Statements for 16 July 2009 (pt 0005) available at https://publi cations.parliament.uk/pa/cm200809/cmhansrd/cm090716/wmstext/90716m0005.htm See, for example, the case study about a mobile home owner described by President of the Property Chamber, Judge Siobhan McGrath at https://www.judiciary.uk/wp-content/uploads/2017/03/mcgrath-how-to-avoid-dancingin-a-ring-spring-2017.pdf Cross-ticketing is used in cases such as service charge disputes, where a judge can also consider issues around arrears of ground rent, enfranchisement cases where the validity of a claim notice is not otherwise in the jurisdiction for the FTT (PC) and beneficial interests in land registration cases, *ibid*.

[10] JUSTICE, *Solving Housing Disputes* (2020, chaired by Andrew Arden QC), pp 92-94, available at: https://justice.org.uk/wp-content/uploads/2020/03/Solving-Housing-Disputes-report.pdf

However, if the second appeal test is different within the tribunal claim to the civil claim, there will be a reason to disaggregate claims. There will be a substantial incentive not to transfer county court proceedings to the FTT (PC), even if they would be better and more efficiently dealt with there. Instead, it will promote keeping as many aspects of a claim away from the Property Chamber as possible, promoting a silo litigation culture. JUSTICE suggests this is highly undesirable.

12. **Remaking decisions:** One particular point of improved efficiency within the Immigration and Asylum Chamber (IAC), on which JUSTICE has reported,[11] is the consistent use of the Upper Tribunal's (UT) power to remake decisions when it finds an error of law upon first appeal from the FTT, rather than remitting the decision back to the FTT. Whilst of course some error of law cases should be remitted, remitting those which can be remade is bad case management and causes delay. Such was the case increasingly in the UT (IAC) in 2018 when JUSTICE reported, and since then JUSTICE has worked with the UT (IAC) to reduce remittal rates.

13. When the UT does remake a decision, however, the second appeal test is a vital safeguard to both sides. If that test is narrowed as proposed, then the UT will be unaccountable for its remade decisions unless the case concerns a matter of exceptional public interest.

14. Given this risk, JUSTICE considers it highly likely that there will be an increase in applications to remit successful first appeals to the FTT, even if they can properly be remade by the UT. As such, there is a real risk that the measure could lead to increased inefficiencies in the lower tribunal.

15. JUSTICE stresses that efficiencies for the Court of Appeal must not be sought by undoing significant progress which has been made and reforms in train at the lower level.

**Impact**

16. Finally, we consider there to be concerningly little data upon which the impact of the second-test proposal has been assessed. There is no consideration of what "exceptional public importance" could mean to different Court of Appeal judges, within different areas of law. There is no clear answer as to how this qualitatively differs to "an important point of principle or practice" in different jurisprudence within the tribunal. Nor have the cases in any other tribunal other than the IAC been considered and flagged. JUSTICE does not

[11] JUSTICE, *Immigration and Asylum Appeals – A Fresh Look* (2018, chaired by Sir Ross Cranston), pp 68-70 available at: https://justice.org.uk/wp-content/uploads/2018/06/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf

consider that the impact, and the risks and sensitivities therein, can be properly or adequately analysed on this basis.

**Q3 For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal do you agree that the right to apply to the Court of Appeal for permission to appeal be removed?**

17. The JUSTICE report *Immigration and Asylum Appeals: A Fresh Look* considered whether the right of appeal against refusals of permission should be curtailed. One proposal considered was that the right of appeal in cases certified by the UTIAC as totally without merit should be abolished unless certified that it raised a point of law of public importance. As a safeguard, any 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. It would also be possible to judicially review the certification.[12]

18. The rationale behind this suggestion was to "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".[13] However, the Working Party rejected the proposal. They felt the right of appeal was an essential safeguard in the, albeit, small number of cases, including those recorded as totally without merit, which have succeeded on appeal. Reference was made to a number of recent cases where the Court of Appeal or Supreme Court have changed the law, affecting many others, in what until these decisions would have been considered as hopeless appeals:

    - *Qadir*,[14] where fraud was alleged by the Home Office in respect of English language tests;

    - *Kiarie*,[15] where foreign national offenders challenged their deportation on human rights grounds, but would have had only an out of country hearing; and

[12] JUSTICE, Immigration and Asylum Appeals: A Fresh Look (2018), para 6.38, available at https://justice.org.uk/wp-content/uploads/2018/06/JUSTICE-Immigration-and-Asylum-Appeals-Report.pdf.

[13] ibid, para 6.37.

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

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

- *MK (Pakistan)*,[16] concerning the appeal rights of extended family members of EU nationals.

19. The Consultation states that the consideration of permission to appeal applications where the Upper Tribunal has certified the case as totally without merit use up considerable judicial time and that removal of the right of appeal to the Court of Appeal in these cases would "remove considerable pressures on Court of Appeal time." However, as stated in the Consultation in 2019 there were only 67 permission to appeal applications in this category of cases. This only amounts to 2.6 per cent of all permission to appeal decisions made by the Court of Appeal in 2019.[17] It is therefore unlikely that the removal of this right of appeal would make a significant difference to the Court of Appeal's workload.

20. It is therefore our view that the right to apply to the Court of Appeal for permission to appeal in judicial review cases where the Upper Tribunal has certified the claim as totally without merit should not be removed.

21. We also note that the issues raised in this consultation with respect to permission for judicial review overlap with the issues covered by paragraph 4(f) of the Terms of Reference of the IRAL.[18] If the Ministry of Justice is minded to proceed with the proposed reforms in this area, we do not think it would be appropriate to do so until the IRAL has reported and there has been an opportunity for the Ministry of Justice to consider the responses to that review and the proposals related to this topic.

**Q7 From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?**
**Q8 What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the Government should consider? Please give data and reasons.**

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

[17] Ministry of Justice, 'Royal Courts of Justice Annual Tables – 2019 (2020), Table 3.10, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/890424/civil-Justice-stats-main-tables-Jan-Mar.xlsx

[18] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915624/independent-review-admin-law-terms-of-reference.pdf

22. The impact assessment and the Consultation acknowledge that the Government does not collect comprehensive information about court and tribunal users. Without data on the protected characteristics of tribunal and Court of Appeal users it is difficult, if not impossible to properly consider what the equalities impacts of these proposals might be. As the impact assessment highlights, as the majority of PTA applications relate to immigration and asylum matters and the largest volume tribunal jurisdiction is Social Security and Child Support, these proposals are likely to have an adverse impact on those who share the protected characteristics of race, religion or belief and disability. Without data on who will be affected by the proposals we do not agree that it is possible to "consider that any such impact is justified on the basis that there is a good case for the proposed reforms". Further the argument that there will be equality of approach adopted by tribunal or court, regardless of any protected characteristic does not address the very real possibility of indirect discrimination highlighted by the impact assessment itself. In our view the Ministry of Justice should not make the proposed changes without a better evidence base to enable them to understand who they will impact and how.