



The Law Society

Tribunal Procedure Committee: Judicial Review of "Fresh Claim" decisions in immigration & asylum cases

June 2011

supporting
solicitors

Introduction

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others. This response has been prepared by the Society's Immigration Law Committee whose members are experienced immigration and asylum practitioners.

Summary

The Society welcomes the opportunity to comment on the proposals contained within this consultation. However, we view the prospect of transfer of these judicial reviews with a significant level of caution. As Lord Thomas of Gresford said in Hansard (at the time the relevant clauses of the BCI Act 2009 were debated in the House of Lords):

"The risk now in allowing the transfer of judicial reviews without any opportunity to assess the capacity and the competency of the Upper Tribunal is threefold. First, there is the immediate risk of injustice to the individual litigant in relation to his fundamental rights, including rights to liberty, life and so forth...Secondly, there is a risk that inadequate handling of these judicial reviews by an untested tribunal will result in an increase in the workload of the supervising court - the Court of Appeal....Thirdly, there is a risk of reduced supervision of the Home Office resulting in it taking greater liberties, leading to more instances of injustice and increased litigation"¹.

We would therefore wish to highlight our following views in addition to our specific response to the consultation questions:

- The Upper Tribunal should replicate the Administrative Court's composition, powers (discretionary or otherwise) and processes in dealing with fresh claim judicial review applications.
- Fresh claim decisions demand the highest calibre of judicial scrutiny - it is therefore essential that judges with High Court experience adjudicate upon applications. Specific protocols about Tribunal panel membership should ensure this. We would suggest that Tribunal Judges who are to hear FCJRs should have sat as Deputies in the Administrative Court and should receive substantial extra training.
- There should be sufficient distance between the decisions of lower courts and those of an Upper Tribunal constituted to hear claims for judicial review.

¹ Hansard, HL 4 March 2009 : Column 792

Consultation Questions

- 1. Do you have any comment on the definition of FCJRs in rule 1? Note that the proposed definition reflects the language of the BCI Act and that if the direction issued by the Lord Chief Justice of England and Wales does not extend to all cases falling within the BCI Act the proposed definition will need to be revised.**

We are content with the proposed definition.

- 2. Do you have any comments on the proposed provision for fees in rules 8 and 28A(1)?**

Access to justice requires that there be discretion to waive the fee in appropriate circumstances, as is presently the case in the Administrative Court. Rule 28A(1) as currently drafted is unnecessarily prohibitive of access and will, if implemented, lead to injustice.

FCJR's are often urgent applications made by extremely vulnerable individuals who may be in immigration detention pending imminent removal, and who will not have full access to legal advice or sufficient funds to pay fees. The consultation paper indicates that the fees will be required 'subject to exceptions' yet no detail is given as to the nature of the exceptions. We would welcome further clarification of this term and strongly suggest that Rule 28A(1) specifically grant the UT discretion to accept applications without payment of the fee.

- 3. In relation to representation for FCJRs:**

(a) Should representation be restricted as it presently is in the Administrative Court?

(b) If so, do the proposed amendments to rule 11 achieve this aim?

The right of audience before the UT in FCJRs should be restricted to those persons who have standing before the Administrative Court. The rule should allow for judicial discretion to hear other representatives where the interests of justice and fairness demand this.

The consequences of execution of an incorrect decision by the Secretary of State are potentially grave and require a standard of representation that is proportional to those risks.. At present this is best guaranteed by the requirement that those wishing to address the Tribunal satisfy the requirements of the Administrative Court as set out in the Legal Services Act 2007.

4. In relation to service of the claim form:

(a) Should the claim form be sent to the Treasury Solicitor by the applicant or by the Tribunal?

(b) If by the applicant, is that aim achieved by the amendments to rules 28 and 29 and the addition of rule 28A(2)?

Claim forms should be sent to the Treasury Solicitor by the Tribunal. As previously stated FCJR applicants are often vulnerable, detained and without funds. Especially when applicants are unrepresented, requiring them to serve claim forms on the Treasury Solicitor would be unnecessarily onerous and add a further procedural hurdle, possible delay and risk to proceedings.

5. Should the current time given for:

(a) oral renewal of a refused FCJR in the Administrative Court (7 days plus 2 days for postal service of the refusal of permission) be replicated for FCJRs in the UT, or should the current UT Rules provision of 14 days be retained?

The current UT Rules provision of 14 days should be retained for FCJR's as it is more suitable to the nature of the forum and consistency would prevent confusion.

(b) lodging and acknowledgment of service (21 days plus 2 days for postal service of the application) be replicated for FCJRs in the UT, should the current UT Rules provision of 21 days, or should some shorter period be prescribed?

The current UT provision of 21 days provides an appropriate timescale for the lodging of an acknowledgment of service by the Secretary of State.

6. Do you have any comments on the interrelationship with other proposed changes to the UT Rules?

We have no comments.

7. Are there any other changes that should be made to the UT Rules in the light of the commencement of Section 53 of the BCI Act? Please be specific about what addition is required and why it is needed?

The UT has no power to grant bail to detained persons yet the lower courts and the Administrative Court possess this power. There is no justification for courts below the UT to have a power which the UT itself lacks. The Rules should be amended to prevent the current position whereby the UT is unable to grant bail even if it consider bail appropriate. This power is all the more necessary in the context of FCJRs where the applicant is likely to be detained.

8. Do you have any questions on the draft practice directions?

The following practice directions should be subject to order by a Special Immigration Judge to waive or defer the requirements in cases which are either urgent, or where such order would be in the interests of justice: 3.1, 4.1, 5.1, 6.1, 7.1, 7.2, 8.1 and 11.1.