Briefing Paper 8.51

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Judicial Review in the Tribunal

1 A recent ministerial statement by Jonathan Djanogly MP, Parliamentary Under-Secretary of State for Justice, extends the process of bringing asylum and immigration appeals within the unified Tribunal system established under the Tribunals, Courts and Enforcement Act 2007. This process is described in detail in Legal Briefing Paper MW 159. It began in February 2010 with the most important step, the abolition of the Asylum and Immigration Tribunal and the transfer of its functions to the Immigration and Asylum Chamber of the unified Tribunal, which took place last year. The First Tier Tribunal hears appeals against adverse decisions by the UKBA. The Upper Tribunal has the power to hear appeals against decisions of the First Tier Tribunal under section 12 of the 2007 Act. The further step now announced by Mr Djanogly is the transfer of specified judicial review applications from the High Court to the Upper Tribunal.

2 A brief note about the general nature of judicial review is appropriate. It is a well established procedure under which the High Court may examine any decisions of government departments, tribunals and other public authorities to see whether the particular decision which is being questioned was in conformity with relevant legal provisions. It is different from an appeal in that the High Court cannot in such a case reach any decision on the merits. If the High Court finds that the decision did not comply with the relevant legal provisions, it can quash the decision and order the department or other authority to reconsider the case in correct accordance with those provisions. In recent years failed asylum seekers have made ever increasing use of judicial review, particularly as a means of contesting orders for their removal, pleading the protection of provisions of the European Convention on Human Rights, especially Article 8, which protects the right to family life and is heavily relied on by applicants who have acquired children during their stays in the United Kingdom. I quote below paragraph 5 from Legal Briefing Paper MW 159, dealing with the specific question of judicial review applications.

3 ***"5. The other and most significant improvement on what was originally proposed is that the Upper Tribunal should be constituted as a court of record, in which High Court judges as well as Senior Immigration Judges will sit. It is intended that the Upper Tribunal will have the power to dispose of applications for judicial review of the Tribunal's own decisions. One motive behind the reconsideration of the asylum and immigration appeals system has been to reduce the considerable burden of judicial review applications which take up a great deal of judicial time and also add considerably to delay in the final disposal of appeals. Under the new system particular types of cases will be transferred to the Upper Tribunal, to be heard in that Tribunal by High Court or other more senior judges. In making the Upper Tribunal a court of record it is hoped that most judicial review applications will be disposed of there rather than in the Administrative Court or its counterparts in Scotland or Northern Ireland. It would have been possible for the government to include in the relevant legislation a bar on any applications for judicial review of Tribunal decisions. However, the government was apprehensive that any such proposal would have met with strong Parliamentary opposition and it has therefore been decided not to include it in the legislation but to leave it to the courts to decide, if the matter is raised before them, whether decisions of the Upper Tribunal are judicially reviewable."***

4 Section 53 of the Borders, Citizenship and Immigration Act 2009 provides for amendments to the Supreme Court Act 1981 and the Tribunals, Courts and Enforcement Act 2007 whereby certain judicial review applications may be transferred to the Upper Tribunal. As the ministerial statement explains, the order for the commencement of section 53 from October 2011 will authorise the “transfer of judicial review applications relating to a refusal of the Secretary of State for the Home Department to treat representations as a “fresh claim” in asylum and immigration human rights cases”. The statement anticipates that the Lord Chief Justice will make a complementary order for transfer from the High Court under the 2007 Act.

5 The subject of fresh claims is dealt with in Rule 353 of the Immigration Rules, which states:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn…..and any appeal to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> - had not already been considered: and
> - taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

Further submissions are a delaying tactic open to applicants and Rule 353A provides that applicants may not be removed before the Secretary of State has considered the submissions. If, as is usually the case, the Secretary of State rejects the submissions, which means that the applicant may then be removed, judicial review of refusal is the final possible delaying tactic. As the penultimate paragraph of the ministerial statement says, “transfer of these judicial reviews will enable fresh claim asylum and immigration human rights applications to be dealt with by judicial members of the Upper Tribunal who have specialist skills and experience in asylum and immigration cases and will also relieve workload pressure on the High Court”. It remains to be seen after October whether these expectations are fulfilled.

Harry Mitchell QC
Honorary Legal Adviser
Migration Watch UK

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