"FRESH CLAIM" IMMIGRATION & ASYLUM JUDICIAL REVIEWS

1. The Lord President is currently considering whether there would be any merit in making an Act of Sederunt which would provide for an additional category of judicial review proceedings to be compulsorily transferred from the Court of Session to the Upper Tribunal. The category in question is applications for judicial review of "fresh claim" immigration and asylum decisions.

2. In order to assist the Lord President in his consideration of this matter, views are invited from any person with an interest in immigration and asylum judicial review proceedings in the Court of Session as to whether it would be appropriate to permit this additional class of judicial review proceedings to be transferred to the Upper Tribunal, or whether the Court of Session should continue to deal with such cases under its supervisory jurisdiction.

Background

3. Section 20 of the Tribunals, Courts and Enforcement Act 2007 makes provision for judicial review applications made to the Court of Session's supervisory jurisdiction to be transferred by the Court to the Upper Tribunal. Such applications may be transferred either on a mandatory basis or on a discretionary basis, depending on which statutory conditions are met.

4. When section 20 of the 2007 Act came into force, on 3 November 2008, one of its effects was to preclude the transfer of judicial review applications relating to immigration and asylum matters.

5. Section 20(3) of the 2007 Act provides for the specification of classes of application which are to be transferred from the Court of Session to the Upper Tribunal. Any such specification is to be made by Act of Sederunt, with the consent of the Lord Chancellor. To date, only one class of application has been specified for the purposes of section 20(3) of the 2007 Act. That class is an application which challenges a procedural decision or a procedural ruling of the First-tier Tribunal[a].

6. The UK Border Agency issued a consultation paper on immigration appeals and judicial reviews in August 2008. That paper included proposals relating to the possible mandatory transfer of judicial review applications in the field of immigration and asylum. In response to that consultation paper, the judges of the Court of Session indicated that, aside from the mandatory transfer of judicial review applications which challenge procedural decisions of the First-tier Tribunal, any more general transfer of judicial review jurisdiction in the area of

[a] Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 (S.S.I. 2008/357).

immigration and asylum should be made only once the Upper Tribunal had gained extensive experience of implementing its (then proposed) remit in that area. The Upper Tribunal (Immigration and Asylum Chamber) was established in, and has been operating since, February 2010.

7. When it comes into force, section 53 of the Borders, Citizenship and Immigration Act 2009 will amend section 20 of the 2007 Act. The effect of that amendment will be that the Court of Session, with the agreement of the Lord Chancellor, will be able to make an Act of Sederunt which transfers to the Upper Tribunal, on a mandatory basis, judicial review applications which challenge "fresh claim" asylum and immigration decisions. The term "fresh claim" is used in this context as a reference to an application which calls into question a decision of the Secretary of State for the Home Department not to treat submissions as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision).

8. It is expected that section 53 of the 2009 Act will be brought into force throughout the UK on 1 October 2011 and that the Lord Chief Justice of England and Wales will shortly thereafter make a direction for England and Wales, the effect of which would be to transfer fresh claim judicial review applications from the High Court to the Upper Tribunal. A decision requires to be made as to whether or not it would be appropriate to make any similar transfer in Scotland.

9. "Fresh claim" challenges might be viewed by some practitioners and other observers as an example of the kind of judicial review application which would be appropriately dealt with by the Upper Tribunal (Asylum and Immigration Chamber). However, the Lord President is mindful that others may take the view that the Court of Session remains the appropriate forum for judicial review proceedings of this type.

10. A number of factors are likely to be taken into account by the Lord President in considering whether an Act of Sederunt should or should not be made in relation to this matter. These include: the experience built up by judges in the Outer House of the Court of Session in dealing with the full range of judicial review proceedings, including many in the field of immigration and asylum and many "fresh claim" challenges within that field; the comparative experience and expertise of those sitting in the Upper Tribunal (Immigration and Asylum Chamber) in dealing with such challenges; the number of judicial review applications currently coming before the Court which challenge "fresh claim" asylum or immigration decisions; and whether or not there is any justification, in policy or practical terms, for allowing this particular category of judicial review

proceedings in the field of immigration and asylum to be transferred to the Upper Tribunal.

11. The Lord President is also mindful of the Supreme Court's judgment in *Eba v. Advocate General for Scotland*, issued on 22 June 2011 [2011] UKSC 29 and, in particular, its comments on the extent to which non-appealable decisions of the Upper Tribunal are amenable to judicial review under the supervisory jurisdiction of the Court of Session. The decision as to what the appropriate forum should be for fresh claim immigration and asylum judicial review proceedings in Scotland will require to be taken against the background of that judgment.

12. Views are sought on these matters and on any other factors which are considered by respondents to be relevant to the issue. Views should be directed, in writing, not later than **Friday, 9 September 2011**, to:

The Lord President's Private Office,
Parliament House,
Edinburgh,
EH1 1RQ.

or

by e-mail to: lppo@scotcourts.gov.uk

13. Responses will be made available to the Lord President and may in due course be published. Please indicate in your response if you do not wish it to be published.