

Civil Courts Review
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Dear Sir/Madam

The Secretary of State for the Home Department currently receives around 140 petitions for judicial review each year involving immigration decisions. Further, the Secretary of State is presently involved in around 45 applications for leave to appeal to the Inner House from the Asylum and Immigration Tribunal (AIT). Consequently, the UK Border Agency of the Home Office wishes to make representations as an interested party in the Civil Courts Reviews. I apologise for missing the closing date for the consultation of 31 March 2008 but hope nonetheless that these representations can still be taken into account.

In relation to judicial review the Agency would wish to make a number of representations. Firstly, we support the establishment of a specialist Administrative Court within the Scottish court structure. Ideally, the Agency is in favour of the creation of designated judiciary within an Administrative Court to deal with immigration matters or, in the alternative, the Court deciding to devolve judicial reviews in immigration cases to a specialist chamber within the new Upper Tribunal. Further, the Agency understands that the High Court in Northern Ireland currently has a judge dedicated to dealing with judicial reviews. The introduction of a similar court in Scotland would therefore be consistent with developments in administrative law in other UK jurisdictions. Further, an Administrative Court with 'specialist' judges would also be consistent with the existence of a specialist tribunal (AIT).

Secondly, the Agency supports the introduction of a leave or permission stage for judicial reviews. Again, we would support the introduction of something consistent with Part 54 of the Civil Procedure Rules (CPR). In particular, this would allow a respondent at least the opportunity, in an Acknowledgement of Service (or something similar), to state his summary grounds for contesting the petition in the form of Answers (or something similar). At present, First Orders rarely allow a respondent the opportunity to oppose a petition early on in the procedure. Allowing the respondent to oppose petitions early on should assist in weeding out unmeritorious claims early on.

Thirdly, the Agency would support the introduction of an expedited procedure at permission stage for some judicial reviews similar to that allowed for by the Part 54 Practice Direction.

Whilst the introduction of fixing a First Hearing at First Orders has greatly reduced the time it takes for most judicial reviews to be resolved in Scotland, we often have to defer removal directions for individuals who have petitioned the court where ultimately what is being argued is academic once these removal directions have been cancelled since that is the only grounds for applying for review. Alternatively removal is deferred for petitions which are ultimately unmeritorious. A failed removal can cost the public purse £11,000 on average if escorts are involved. For example in the month of March 2008 10 removals were deferred on the basis of a petition for judicial review in Scotland. One petitioner was ultimately refused legal aid and a further 4 petitions were ultimately academic the moment that First Orders were granted and removal cancelled. One of these petitioners had also lodged a claim for judicial review at the Administrative Court on the same day raising the same issues included in the petition before the Court of Session. This petition is to be dismissed. The application for judicial review before the Administrative Court has already been dismissed.

Cases of this kind are also generally dismissed very close to the First Hearing despite them being academic from almost immediately after First Orders has been granted. In these circumstances, an expedited process, similar to that currently operated at the Administrative Court would identify these cases at a much earlier stage and would allow for far quicker resolution of these cases. Suitable cases for expedition could be identified by us and the Office of the Solicitor to the Advocate General. Of the 11 cases which went to a First Hearing between April 2007 and March 2008 9 were dismissed. The 2 cases which were allowed were petitions challenging the refusal leave to appeal by the Immigration Appeal Tribunal which had been outstanding for a considerable period of time.

Fourthly, we would support the introduction of a time limit for raising a petition for judicial review. Again, this would be consistent with the CPR and the Northern Irish Court Rules. By way of an example to illustrate the problem we are still being served with challenges to the Immigration Appeal Tribunal (IAT) refusing permission to appeal to them against a decision of an Adjudicator. With the introduction of statutory review in the Nationality, Asylum and Immigration Act 2002 judicial review of a decision of the IAT was no longer possible. However, due to the absence of a time limit in Scotland these petitions still occur. Similarly, judicial review of a decision taken to refuse a fresh human rights or asylum claim under paragraph 353 of the Immigration Rules can presently be challenged at any time. A fixed period to bring such challenges would mean that petitioners would need to focus their minds earlier, rather than challenge decisions of this kind when removal action is initiated.

The third and fourth points are particularly pertinent in respect of family cases where detention is involved. The Agency takes every step to persuade families that are here illegally to leave without having to resort to detention. There is general agreement amongst our stakeholders and the Agency that this can be distressing to all concerned, especially the children. Where a petition is received on a detained family, the timescales to a hearing mean that we have to release the family since there is no immediate prospect of removal. That does however mean that if the petition is dismissed, as is the norm, the distressing process of arrest and detention must happen all over again. Under the expedited system operated by the Administrative Court the case can be disposed of within 10 working days and the family can be released once and for all if the petition succeeds or be removed without the need for a further arrest and period of detention if the petition is dismissed.

Fifthly, we would support the introduction of something similar to a Wasted Costs Order allowed for by s51(6) of the Supreme Court Act 1981 and Rule 48.7 of the CPR. The prospect of an agent having to meet 'wasted costs' for an unmeritorious petition for judicial

review may act as a disincentive to lodge such petitions. Presently, as most petitioners are legally aided, even if a petition is dismissed in favour of the Secretary of State expenses are modified to nil. Clearly, this is not a sufficient disincentive to dissuade petitions being lodged which are designed to do nothing more than frustrate removal.

Finally, we support the introduction of a Pre Action Protocol (PAP) in relation to judicial reviews. At present such a Protocol exists in England and Wales and the Northern Irish High Court is consulting with stakeholders with a view to introducing something very similar there. Petitions alleging unreasonable delay in decision making on the part of the Secretary of State are relatively common. A formal requirement for a Letter before Claim/Petition would clearly impact on cases of this nature, hopefully leading to fewer of these cases being brought before the court for one reason or another. The introduction of a PAP would also impact on other JRs where there is less urgency ie non removal cases. For example if a decision taken by the Agency is not sufficiently strong to defend in a petition for judicial review then these cases can be reconsidered without the need for unnecessary proceedings before the court. Equally, the PAP may also serve to weed out unmeritorious petitions against the Secretary of State.

In relation to Inner House appeals from the Asylum and Immigration Tribunal, UK BA would also support a similar system to that of Part 52 of the CPR. Presently, the practice is that when an application for leave to appeal is made to the Inner House after the AIT have refused to grant permission, this application is then dealt with when a hearing is fixed on the Summer Roll. This can be over a year after the application has been made. Again, The Agency would support a system consistent with that in England where an application for leave to appeal is considered on papers in the first instance by a Lord Justice. A system of this nature would allow for quicker resolution of appeals where ultimately leave to appeal is refused by the court.

Additionally, UK BA would also support a shortening of the timescale for seeking leave to appeal from the Inner House. Presently, this is set at 42 days from the decision of the AIT to refuse leave to appeal by virtue of Rule 41.20 of the Court of Session Rules. In England and Wales such applications have to be made within 10 days of the AIT refusing leave to appeal. Aligning the time limits would bring further consistency with what is required by immigration appellants north and south of the border.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Phil Taylor', written in a cursive style.

PHIL TAYLOR