

# ILPA information sheet

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## Fresh Asylum and Human Rights Claims

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The May 2007 “Fresh Asylum Claims” information sheet [<http://tinyurl.com/9leh7hg>] provides information relevant to both fresh asylum claims and fresh human rights claims. The information in that information sheet is generally relevant to the question of what is a fresh claim.

The October 2009 “Making Asylum Claims and Further Submissions” information sheets [ ] provide information relevant to the process by which further submissions, including fresh claims, may be made to the UK Border Agency. (The information given in those information sheets also included information about how to make a first asylum claim. The August and September 2011 “Making Asylum Claims” information sheets [<http://tinyurl.com/9o3j6au> and <http://tinyurl.com/8mvfaey>] now provide updated information about making first asylum claims.)

This information sheet provides information about judicial review challenges to a decision by the UK Border Agency that further submissions do not constitute a fresh claim (whether a fresh asylum or fresh human rights claim).

### **What is judicial review?**

If there is no other right of appeal or review available (e.g. by a court or tribunal), an action (or inaction) by Government or a Government agency may be challenged by judicial review. The Home Office is a Government agency for these purposes, and a UK Border Agency decision that further submissions do not constitute a fresh claim may be challenged by judicial review.

A judicial review challenge may be successful if the UK Border Agency is acting unreasonably or unlawfully. However, these are relatively strict tests. On a judicial review application, the court or tribunal (see below) judge will generally not make his or her own decision about what is or is not reasonable. In cases concerning whether further submissions do constitute a fresh claim, the judge will usually consider the reasons given by the UK Border Agency for the decision that the further submissions do not do so and decide whether the UK Border Agency has considered all the relevant circumstances of the case and provided reasonable and relevant reasons for the decision.

If relevant circumstances have not been considered, judicial review may be successful. If irrelevant or inaccurate reasons for refusal of a fresh claim have been relied upon, judicial review may be successful. However, success on judicial review may, in some cases, mean no more than that the UK Border Agency must reconsider the case.

It is highly advisable to get legal advice and representation to assist with any judicial review. Legal aid can be available for judicial review (see below). Claiming legal aid involves completing detailed forms; and the inability of the individual to pay and the chances of his or her legal case succeeding will need to be assessed.

### **Judicial review of UK Border Agency decisions that further submissions do not constitute fresh claims**

In *MN (Tanzania) v Secretary of State for the Home Department* [2011] EWCA Civ 193, the Court of Appeal considered the approach required of a court or tribunal judge dealing with judicial review of a UK Border Agency decision that further submissions do not constitute a fresh claim.

The Court of Appeal decided that it was not for the judge to make his or her own decision as to whether the further submissions did constitute a fresh claim. In that case, where it was acknowledged there was new information (see the May 2007 “Fresh Asylum Claims” information sheet), the question for the judge was to decide whether the UK Border Agency had acted unreasonably or unlawfully in reaching a decision that no immigration judge could (if properly applying the law) have allowed an appeal based upon the further submissions.

### **The courts and tribunals which deal with judicial review cases**

In the past, the High Court has been the court before which all applications for judicial review were brought in England and Wales. In Scotland, the relevant court is the Court of Session; and in Northern Ireland, the Northern Ireland High Court. However, the Tribunals, Courts and Enforcement Act 2007 passed some judicial review powers to the Upper Tribunal, which was established by that Act. While the High Court continues to deal with many judicial review cases, in England and Wales some judicial review cases are now dealt with by the Upper Tribunal. The Immigration and Asylum Chamber of the Upper Tribunal currently deals with two types of judicial review case, if these are transferred to it by the High Court:

- judicial review of a local authority’s assessment of the age of an asylum-seeker claiming to be a child
- judicial review of a UK Border Agency decision that further submissions do not constitute a fresh claim

The Government intend to permit other immigration and nationality judicial reviews to the Upper Tribunal, and have included a provision in the Crime and Courts Bill to do this. That Bill is currently before Parliament. More information on the Upper Tribunal is provided by the February 2010 “Immigration Appeals 2” information sheet [<http://tinyurl.com/8w6rox4>].

### **Legal aid**

Currently, legal aid is generally available for judicial review cases. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 is intended to change the availability of legal aid from April 2013. This will affect some immigration judicial review cases. While legal aid will generally remain for judicial review cases there will be some immigration judicial review cases where it will no longer be available.

This will not affect judicial review of a decision by the UK Border Agency that further submissions do not constitute a fresh asylum claim. Legal aid will continue to be available in such cases. Where the issue is whether further submissions constitute a fresh human rights claim, the answer may be different. If the fresh human rights claim is e.g. based on Article 3 (the right not to be subjected to torture, inhuman or degrading treatment or punishment), legal aid will continue to be available. If the fresh human rights claim is e.g. based on Article 8 (the right to respect for private and family life), legal aid will no longer be available.