



# information sheet

## Transfer of Judicial Reviews

3<sup>rd</sup> February 2009

The Borders, Citizenship and Immigration Bill (see the January 2009 information sheet) includes a provision to allow of the transfer for immigration and nationality judicial reviews from the High Court to the Upper Tribunal.

This information sheet provides information about this provision (clause 50) in the Bill.

### Judicial review

Judicial review is the primary means by which the courts can scrutinise the actions and decisions of the Government and other public bodies to ensure that their decisions and actions are lawful. Applications for judicial review are made to the High Court.

Some further information as to how judicial review works is provided in the September 2007 "Removals and Judicial Review" information sheet.

Judicial review has proven to be of great importance in the areas of immigration and nationality law. In recent years, high profile cases include:

- The case of *R(Abdi & Ors)* [2008] EWHC 3166 (Admin) which led the Home Office to disclose their policy on the detention of foreign nationals who have served terms of imprisonment in the UK. The Home Office had kept the policy secret for over 2 years. The policy was found to be unlawful.
- The case of *R(HSMP Forum Ltd)* [2008] EWHC 664 (Admin) where the Home Office had, without warning, changed the Rules by which highly skilled migrants could obtain indefinite leave to remain in the UK. These migrants had already been admitted to the UK on the basis that they would settle here, and accordingly had moved their homes and their families. The change was found to be unlawful.
- The case of *R(Limbu & Ors)* [2008] EWHC 2261 (Admin) which challenged the Home Office policy on when foreign national members of the British armed forces would be admitted to the UK in order to settle here. The policy disadvantaged Gurkhas, and was found to be unlawful.
- The case of *AM (Cameroon)* [2008] EWCA Civ 100 where the Asylum and Immigration Tribunal (AIT) had prevented an asylum-seeker from presenting important evidence at her appeal. The AIT was found to have acted unlawfully by prevented any fair hearing.
- The litigation that has forced the Government to suspend removals to Zimbabwe since July 2005. This led to the decision in *RN (Zimbabwe)* [2008] UKAIT 00083 that any Zimbabwean who cannot demonstrate loyalty to the Mugabe regime is unsafe and cannot lawfully be removed to that country. Although this litigation had proceeded in the AIT and the Court of Appeal on appeal, it originated from judicial reviews before the High Court in 2005, from which the suspension on removals had resulted.

### The Upper Tribunal

The Upper Tribunal is the second tier of the new Tribunal regime introduced by the Tribunals, Courts and Enforcement Act 2007. This new regime has replaced many tribunals (including tribunals dealing with social security, tax and mental health law). Currently, however, it does not include immigration and nationality law, which continue to be dealt with by the separate Asylum and Immigration Tribunal (AIT).

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The UK Border Agency has proposed that the AIT should be brought within the new Tribunal regime; and published a consultation in August 2008. The Agency has published the responses it received to that consultation, but has not yet produced any response to these. The consultation and responses are available at:

<http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/immigrationappeals/>

The Tribunals, Courts and Enforcement Act 2007 gives judicial review-like powers to the Upper Tribunal and empowers the High Court to transfer judicial review cases to the Upper Tribunal. However, immigration and nationality cases may not be transferred.

### **Borders, Citizenship and Immigration Bill**

This Bill would extend the power of the High Court to transfer judicial reviews to the Upper Tribunal, by allowing for the transfer of immigration and nationality cases.

In 2007, during the passage of the Tribunals, Courts and Enforcement Bill, Parliament objected to the transfer of immigration and nationality judicial reviews unless and until the Upper Tribunal could be seen to be working well and dealing with immigration and nationality law. In the face of Parliament's objections, the Government conceded that further primary legislation should be required before the High Court's power to transfer judicial reviews should be extended to immigration and nationality cases. This was to allow Parliament to review how the Upper Tribunal had worked before allowing for transfer of these cases.

However, Parliament still cannot review how the Upper Tribunal has worked. The Upper Tribunal has only been in existence since November 2008. It still does not include immigration or nationality law. It cannot be assessed how effectively or efficiently the Upper Tribunal would deal with these judicial review cases. It cannot, therefore, be assessed what impact transfer of these cases would have upon the work of the Court of Appeal, to which appeals against the Upper Tribunal would be brought, or the High Court.

### **Why is this included in the Bill now?**

The UK Border Agency's August 2008 consultation paper states:

*"The Upper Tribunal would need to be well-established before any such a provision on transferring judicial review applications would be commenced and any transfers could be made."*

Since immigration and nationality law is still not dealt with by the new Tribunal regime, there is no reason for any urgency to include this provision in the Bill. However, by including the provision in this Bill, the Government is seeking to deny to Parliament what Parliament had insisted upon in 2007.

### **Scotland and Northern Ireland**

In Scotland and Northern Ireland, judicial review cases are dealt with by the Court of Session and the High Court of Justice in Northern Ireland respectively.

In Scotland there are outstanding reviews and recommendations affecting judicial review and tribunals, which should be considered, before any decision is taken on transfer of judicial review in immigration and nationality cases. In particular, there is:

- Lord Gill's review of civil courts in Scotland
- the October 2008 report of the Administrative Justice Steering Group on the future of tribunal administration and supervision in Scotland