THE CONSTITUTIONAL AND ADMINSTRATIVE LAW BAR ASSOCIATION

RESPONSE TO UK BORDERS AGENCY CONSULATION:
IMMIGRATION APPEALS, FAIR DECSIONS, FASTER JUSTICE (2008)

## Introduction

1. This is the response of the Constitutional and Administrative Law Bar Association ("ALBA") to the consultation paper issued by the UK Border Agency ("UKBA") on 21 August 2008, entitled "Consultation: Immigration Appeals, Fair Decisions, Faster Justice" ("the Consultation Paper"). The Consultation Paper contains proposals for the restructuring of immigration appeals by fitting them within the unified tribunal structure created by the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

2. ALBA is one of the four leading specialist bar associations represented on the Bar Council. It represents a wide range of practitioners in the fields of public and administrative law and human rights, as well as solicitors and others with an interest in these fields[1]. Members of ALBA have particular experience of judicial review, and of administrative justice generally, and its members include practitioners who regularly appear both on behalf of individuals and the Secretary of State in cases involving immigration, both in the Administrative court, and the Asylum and Immigration Tribunal ("AIT") and its predecessors. This response has been approved by ALBA's Executive Committee, which has 19 members representing all levels of seniority and fields of practice.

## Summary

3. ALBA considers that there are welcome features of the current proposals. In particular, one of the effects of these proposals is to bring immigration appeals within the more general structure for dealing with administrative justice established by the 2007 Act. The integration of the immigration appeals system into this wider structure should help to ensure that standards of fairness which are taken for granted in other areas will become part of the everyday culture of the immigration appeals system. The increased involvement of High Court judges in the new structure is also to be welcomed. However, ALBA considers that the potential future benefits of these changes, in terms of possible improvements in decision-making over time, are outweighed by a number of worrying features of the current proposals which may seriously undermine the integrity of the new scheme and the likelihood of real improvements, and which are

[1] As associate members.

deeply troubling to constitutional lawyers. These features include the proposal that the procedure rules of the new AIT may, uniquely within the new structure, continue to be set by a government minister rather than the new Tribunal Procedure Committee ("the Procedure Committee"), and other proposals which would severely restrict access to the higher courts in ways which ALBA considers to be contrary to the basic principle of access to justice.

4. ALBA's most pressing concern relate to those features of the proposed new scheme which, if operated in the way envisaged in the Consultation Paper, would oust, or at any event very severely restrict, access to the higher courts, by restricting:
   (i) access to the Administrative Court to challenge decisions of the new Tribunal itself, via judicial review or some statutory review procedure; and
   (ii) onward statutory appeal to the Court of Appeal.

5. These concerns are further exacerbated by the prospect of the transfer of immigration judicial review cases from the Administrative Court to the new Tribunal. In part the proposals appear to be based upon assumptions which ALBA believes may be incorrect, about the approach that would need to be taken by the relevant courts themselves. However, in so far as those assumptions are correct, or are reinforced by further legislation, ALBA believes that the results would be wholly unacceptable.

6. **This means that ALBA opposes the current scheme.** The proposed limitation of access to the higher courts does not begin to be outweighed by the prospect of a limited increase in High Court judge participation in the work of the new Tribunal, nor by the still more nebulous prospect of increases in the overall quality and fairness of the work of the immigration judiciary.

7. Indeed, the current proposals would seem to achieve by the back door the very objective of cutting down access to the higher courts which the government tried to achieve by its reforms of immigration appeals in 2004. The 2004 proposals met with fierce and principled opposition from a particularly wide variety of sources, including some of the most senior members of the judiciary and the legal profession. While the current proposals do not go quite so far, their combined effects are scarcely less far reaching in terms of access to the higher courts. They are therefore equally unacceptable in principle. ALBA's principled concerns as to the above issues are dealt within in section (A) of this response.

8. Finally, ALBA also has some more detailed comments on particular aspects of the new scheme, arising out of questions posed in the Consultation Paper, which are addressed in section (B) below.

## (A) LIMITATIONS ON ACCESS TO THE HIGHER COURTS

### Judicial review of Tribunal decisions

9. Attempts by the government to limit judicial review of decisions of the relevant immigration appellate authorities (the AIT and its predecessors) have been a subject of controversy for some time. Prior to 2002, the availability of judicial review to challenge decisions of the old Immigration Appeal Tribunal ("IAT") was well established: see e.g. *R v Home Secretary, ex p Robinson* [1998] QB 929. The government's first step to limit access to judicial review was the introduction, in the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), of a statutory review process in place of judicial review, by which applicants were limited to an application on paper to establish an arguable point of law in the decision of the IAT refusing leave to appeal. A further step, albeit similar in its final form, was the replacement of statutory review with "renewed" applications for reconsideration under section 103A of the (amended) 2002 Act, following the establishment of the AIT in 2005.

10. The reconsideration process was itself the result of a compromise on the government's much more ambitious attempt to restrict judicial review of all decisions made under immigration powers, whether of the Home Office itself, or of the proposed AIT. The government's decision to resile from this proposal was the result of strong objections to these proposals from persons which included the Bar and the Senior Judiciary, including ALBA. In ALBA's view, the compromise then reached should not be disturbed within such a short space of time. That compromise has also subsequently received the approval of the Court of Appeal in *R (G) v IAT* [2005] 1 WLR 1445, and *R (F) (Mongolia)) v AIT* [2007] 1 WLR 2523, where the court held that statutory review provided an acceptable balance between the rights of immigrants and the legitimate aim of ensuring that the immigration appeals process is not unduly prolonged.

11. It is therefore extremely troubling that the Consultation Paper envisages that there would be neither judicial review, nor any equivalent or substitute form of statutory review, of decisions of the new Upper Tribunal. There are two ostensible rationales for this in the proposal. Either the Upper Tribunal is to be regarded as having the "status" of a superior court of record (paragraph 18 of the Consultation Paper), which, the government has apparently been advised (consultation paper para 23) will render its

decisions subject to judicial review only in "exceptional circumstances", or its decisions shall be given equivalent status by statute (paragraph 24), so as to "ensure that decisions of the Upper Tribunal are not routinely challenged by judicial review".

12. ALBA has doubts about the correctness of the view expressed in paragraph 23 of the Consultation Paper, that judicial review of the Upper Tribunal will not be available by reason of its status as a superior court of record. It is not clear that there is any absolute rule which prevents judicial review of superior courts of record, and in any event such a rule would have to be considered in the modern context of the Human Rights Act 1998 and the increased importance of EU law (immigration cases very frequently involve substantial issues both of human rights and EU law).

13. Whether or not the view expressed in the Consultation Paper is correct, or confirmed by legislation as envisaged, ALBA believes that the effective ouster of judicial review envisaged in the Consultation Paper cannot be justified. It is also unacceptable to introduce, by the back door, the very result for which the government contended for in 2004, and in doing so to depart from the compromise established at that time.

14. The need for access to the Administrative Court to challenge decisions, and particularly decisions on permission to appeal, by the upper tier immigration tribunal (whether constituted as the IAT, Senior Immigration Judges of the AIT, or the new Upper Tribunal), has repeatedly been recognised by the courts. A particularly clear statement can be found in *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475, at paragraph 52. The Court of Appeal was there contrasting the special position of the IAT with the position of a Circuit Judge considering whether to grant leave to appeal the decision of a District Judge. The court said:

> *52. There are, in our judgment, special factors which fully justify the practice of entertaining applications for permission to claim judicial review of refusals of leave to appeal by the Tribunal. In asylum cases, and most cases are asylum cases, fundamental human rights are in play, often including the right to life and the right not to be subjected to torture. The number of applications for asylum is enormous, the pressure on the Tribunals immense and the consequences of error considerable. The most anxious scrutiny of individual cases is called for and review by a High Court Judge is a reasonable, if not an essential, ingredient in that scrutiny.*

15. These special factors have not diminished either in importance, or prevalence. Indeed, the Consultation Paper recognises, in paragraph 21, that the new Upper Tribunal "would potentially have to deal with a similar volume of appeals to the present number of reconsiderations heard by the [AIT]". The prevalence of appeals raising issues of fundamental human rights has certainly not diminished, and in addition the

AIT, and any successor, will have an increasing responsibility for adjudicating over issues of EU law, including both in relation to "fundamental rights" under EU law, and free movement issues which are legally complex, and where error may place the UK in breach of its treaty obligations.

16. In the subsequent cases of *R (G) v IAT* [2005] 1 WLR 1445 and *R (F) (Mongolia)* [2007] 1 WLR 2523, where the court was faced squarely with the question of the adequacy of statutory review / reconsideration applications as a statutory replacement for judicial review, the Court of Appeal did not resile from the view expressed in *Sivasubramaniam* that review by a High Court judge was an essential ingredient of anxious scrutiny of the asylum process. Rather, it expressly stated (at paragraph 21 of G) that the legitimate aim of seeking to expedite the consideration of asylum appeals "cannot justify refraining from the use of judicial if the alternative of statutory review will not provide a satisfactory safeguard ...". In holding that statutory review did (in general) provide such a safeguard, it relied upon the fact that the process provided access to a High Court judge and that the risk of a point of law being overlooked by reason of the absence of an oral hearing "was not great", so that the practical difference between statutory review and judicial review was correspondingly limited. The Court of Appeal has subsequently held that even the availability of statutory review is not in all cases sufficient, so that judicial review can, exceptionally, be pursued even where statutory review is available, and has been used: *R (AM (Cameroon) v AIT* [2008] 1 WLR 2062.

17. In light of that, it is plain that, for the wholesale abolition of judicial review to be justified, the change to the new Tribunal would need to involve some fundamental change such as to remove the need for further access to the High Court recognised in the above cases. Before dealing with that, however, it may be helpful to address the matters referred to in the Consultation Paper which are regarded by UKBA as requiring some further limitation.

<u>**The supposed benefits of further restrictions**</u>

18. Two reasons are given in the Consultation Paper for the government's current view that further recourse to the Administrative Court is undesirable following a refusal of leave by the Upper Tier, namely (i) the apparent perception that recourse to the Administrative Court causes unacceptable delays "at the tail end of the appeal process", and (ii) the contention that a very small proportion of such applications will result in the grant of asylum.

19. As to the first point, it is noteworthy that the paper relies on figures as to the Administrative Court workload from the period 2005 – 2007, but makes no mention of the announcement by the Ministry of Justice in April 2008 that it would be taking action on delays caused by judicial shortages in the Administrative Court. It is reasonable to expect that the time for decisions on reconsideration applications in the High Court should improve, and that this will be further assisted both by the proposed transfer of certain judicial review cases to the new Tribunal, and by the prospect of regionalisation of the Administrative Court itself. It is far from clear that a relatively small reduction (of at most 2 months even on the figures quoted in the Consultation Paper) in the speed with which immigration appeals are decided would impact upon UKBA's ability to conduct removals. There is a large backlog of cases for removal in any event. The asserted need for expedition so as to facilitate government targets for removals does not, in truth, bear scrutiny, and certainly does not justify the curtailment of something previously recognised by the higher courts as an essential part of the asylum process.

20. As to the second point, the figure of 2% of "asylum applicants" quoted at paragraph 11 is unsourced. Its meaning is also unclear. Read literally, it states that 2% of asylum applicants (i.e. person applying for asylum) benefit from an order for reconsideration. If that is what is meant, it is unsurprising, since only a proportion of those applying for asylum will seek a reconsideration order from the higher court (some will be granted asylum outright, others on appeal, and others may be granted reconsideration by an SIJ, quite apart from those who simply choose not to appeal further). Even if it is meant that only 2% of applications to the higher courts for reconsideration are granted, that figure, it is to be relied upon, should be put in its proper context. Reliance upon a single, unourced and ambiguous statistic is wholly unsatisfactory as a justification for restricting access to the higher courts.

21. In ALBA's view the proposed justifications, at least on the information supplied, do not stand up even to relatively brief scrutiny. If the government wishes to rely upon such matters then it must at least put such claims in their proper context, for example as to the backlog of removals or the overall statistics for success on asylum appeals.

**<u>The new Upper Tier: what is different?</u>**

22. The sole reason given in the Consultation Paper for the assumption that judicial review will no longer be available of decisions of the Upper Tier is that this new Tribunal will

be given the status of a superior court of record. In consequence of that, it is envisaged that there will be increased involvement of the senior judiciary, including High Court judges, in the work of the Upper Tier.

23. The proposed designation of the Upper Tier as a superior court of record is, in itself, a matter of form only. Unless it is accompanied by real change in the way that the Upper Tier conducts itself, both in terms of adequate procedures, and an increase in the quality of decision making, it does not provide a justification for the restriction or abolition of judicial review of the tribunal's decisions. It is not accompanied by any increase in the independence of the Upper Tribunal judiciary, (for example, by a change in their terms of appointment), nor by any change in their status, as compared with Senior Immigration Judges at present. While it is understood that there will be some use of Circuit Judges as members of the Upper Tribunal, the notional status of Circuit Judges is at present the same as that of Senior Immigration Judges.

24. In practice, any immigration chamber of the Upper Tribunal is likely to be overwhelmingly staffed, at least initially, by those who are currently Senior Immigration Judges (and possibly Designated Immigration Judges). There is no reason to think that the simple change in name will have any effect on their decision making. Even if it is to be hoped that the establishment of the new tribunal might produce a change in culture amongst the senior immigration judiciary, it is obvious that such change will take time. As already noted, the new Upper Tier is likely to face precisely the same pressures faced by the IAT and senior judges of the AIT.

25. Thus if limitation upon the right to recourse to judicial review of the Upper Tier is to be considered justifiable, it must be solely as a result of the increased use of High Court judges in the Tribunal itself. It may be noted first that this change is itself only a matter of degree. The present President of the AIT, and the two most recent Presidents of the IAT, are High Court Judges, and thus there have been puisne judges sitting in the IAT since 2000 (before the Court of Appeal considered *Sivasubramaniam*). Their involvement is to be applauded but it is clear that the mere fact of the presence of such judges within the Tribunal cannot by itself address the need for review, by a High Court judge, of individual cases.

26. There are two important reasons why the increased involvement of High Court judges in the work of the Upper Tribunal cannot be considered a satisfactory answer to the need, recognised in *Sivasumbramaniam*, for review by a High Court judge as part of the

asylum process. The first, which is a development of the point just made, is that the mere involvement of an increased number of such judges in the work of the Tribunal cannot in itself be a satisfactory answer to the need for such review to be available in specific cases. It is no consolation for an individual whose case has been wrongly rejected, to be told that it would have succeeded if he had been one of the lucky few whose case was considered by a High Court judge (or that, had his case raised some point of principle, it would have been considered by such a judge). For so long as the majority of the work of the Upper Tribunal is not to be conducted by judges of the High Court, as would appear inevitable, judicial review, or at least some proportionate substitute, must be retained.

27. Secondly, and in ALBA's view crucially, it is important to recall that the decisions of the Upper Tribunal where judicial review will most frequently be called for are its decisions as to the grant of permission to appeal to itself. It is at this point that (depending on how certain issues raised in the Consultation Paper are decided) the applicant may have no more than the right to a single paper application, **with no further review**, and it is at this point that the pressure on the system, and hence the potential for error, is at its greatest. Against that background, the following considerations are crucial:

    (i) First, in making this decision, members of the Upper Tribunal act as the "gatekeepers" in terms of onward access to the higher courts via the statutory appeal route (as did the IAT, and senior immigration judges of the AIT, before it). If judicial review, or some surrogate such as statutory review, is not available, then all access to the higher courts is cut off at this point, notwithstanding that an individual's case may involve fundamental human rights considerations and have been refused on spurious grounds or even after a manifestly unfair procedure (see the facts of *AM (Cameroon)* cited above).

    (ii) Access to the higher courts can therefore be cut off by a single decision on the papers, with a serious risk of error in the best of circumstances.

    (iii) The absence of any alternative route of access to the higher courts will allow potentially mistaken views of the law to become entrenched within the Tribunal, which will refuse permission to appeal on the basis of its own case law and thereby prevent the issue being considered at a higher level.

    (iv) Most importantly, despite that, it seems unlikely that there will be <u>any</u> High Court judge involvement at this stage.

28. This last point is crucial. The very point at which High Court judge involvement in the work of the new Tribunal might be said to be necessary if it is to justify the removal of the right to apply for judicial review of refusals of permission, is precisely the point at which it would be least likely that High Court judges will be deployed. That is not to say that it would be sensible for such judges to be routinely deployed solely or primarily in considering applications for permission to appeal to the Upper Tribunal: that would not be a sensible use of such valuable judicial time. But the merit of the present system, and its predecessors, is that it enabled the majority of leave applications to be dealt with at an appropriate judicial level, thereby performing a filtering function, whilst preserving the possibility of a further application to the High Court, and hence complying with the need for such review as recognised in *Sivasubramaniam,* and *G v IAT.*

29. A further area where judicial review may be necessary or appropriate is in cases where the Upper Tribunal exercises its power of review of its own decisions under section 10 of the 2007 Act. They are excluded decisions for the purposes of section 13 and hence do not attract any right of appeal. It is certainly possible that an applicant might be prejudiced by the exercise of such power on doubtful grounds, and yet (if the Consultation Paper is correct in its assumptions) have no redress. That is a further troubling feature of the current proposals. Again, it is perhaps unlikely that such review decisions will be routinely taken by High Court judges, and it seems at least possible that they may be taken on the Tribunal's own motion without notice to the parties.

**Limitations on statutory appeal to the Court of Appeal**

30. By contrast with the gradual limitations on the availability of judicial review to challenge decisions of the IAT and the AIT, no statutory limitation has ever been imposed upon onward appeals from those tribunals to the Court of Appeal.

31. The 2007 Act however contains machinery that would enable the Lord Chancellor to impose very severe restrictions on onward appeals. While section 13 of the 2007 provides for a right of onward appeal (subject to permission), section 13(6) empowers the Lord Chancellor, by order, to provide that permission should only be granted in cases where (i) the proposed appeal raises some important point of principle or practice, or (ii) there is some other compelling reason for the appeal to be heard. Cases involving a point of principle will presumably be relatively rare. The Court of Appeal has interpreted the identical wording in section 55 of the Access to Justice Act 1999, and

CPR 55.13 (which relate to second appeals from the county court or the High Court) as imposing strict limitations on the grant of leave. In *Uphill v BRB (Residuary) Ltd* [2005] 1 WLR 2070, Dyson LJ said that (paragraph 24) "... it is unlikely that the court will find that there is a compelling reason" for granting permission unless it considers "... that the prospects of success are very high". He continued by saying that "...the fact that the prospects of success are very high will not necessarily be sufficient to provide a compelling reason", albeit he did go on to say that there may be cases where there is a compelling reason notwithstanding a somewhat lower prospect of success, especially in cases involving some procedural irregularity.

32. ALBA understands that, though it is not expressly stated in the Consultation Paper, it is envisaged that this power will be exercised in the case of immigration appeals within the new tribunal[2].

33. As with the proposed limitations upon the right to seek judicial review, ALBA has some doubts as to whether the exercise of this power could be constitutionally effective. But in so far as it did act to limit onward rights of appeal, ALBA considers that it could not be justified, and would risk placing the UK in breach of its international obligations.

34. The Consultation Paper does not provide figures in relation to the volume of immigration cases presently undertaken by the Court of Appeal, but ALBA understands that the current proposals are in part driven by a concern about the disproportionate volume of such cases heard by the Court of Appeal. ALBA is aware that it has been said that immigration appeals may constitute as much as 30 - 40 % of the total caseload of the court.

35. That is plainly a matter of concern. Nevertheless, in ALBA's view it does not justify a limitation on statutory appeals to the Court of Appeal, essentially for three reasons:
    (i) The present high volume of appeals is the product of the present structure of immigration appeals, which has been distorted by the government's attempts to create a flat or "single tier" structure in the AIT. A proper assignment of responsibilities between an upper and a lower tier, and higher quality decision making in the Upper Tier, should greatly reduce the burden on the Court of Appeal.

[2] In a meeting with the Immigration Law Practitioners Assocation ("ILPA") on 30 September 2008, Carnwath LJ stated expressly that it was proposed that appeals to the Court of Appeal would be available on a point of public importance only.

(ii) The Court of Appeal has been greatly occupied with immigration appeals precisely because so many of the appeals have merit, which necessitates the grant of permission to appeal. There is no evidence to suggest that the time spent on immigration appeals is largely spent on hearing unmeritorious applications for permission to appeal (and, because of its power to decide that an appeal is totally without merit, thereby cutting off any right to renew the application, the court has itself the power to control the amount of time spent in considering such applications). It is noteworthy that, in contrast to the success rate figures cited for reconsideration applications in the Consultation Paper, no figures are given as to the proportion of onward appeals in which permission to appeal is granted, or how many appeals eventually succeed.

(iii) Most fundamentally, it is neither morally acceptable, nor consistent with the UK's international obligations and the procedural commitments contained within them that cases in which there may be, *ex hypothesi*, a real prospect that an individual may be able to show that they have a well founded fear of persecution, or risk of torture, or indeed any other breach of their human rights, should nevertheless be refused leave to appeal by reference to the criteria set in section 13(7) of the 2007 Act.

36. The Court of Appeal's present workload stems directly from the AIT appeals structure. The expectation was that, following the establishment of the AIT, there would be at most two stages to the appeals process. Following a "first instance" decision, either party could apply for reconsideration on the basis of an arguable error of law. If granted, a hearing would follow, to determine (i) if an error of law was present, and (ii) how to dispose of the case. That could impose practical difficulties even in cases where the error of law identified did not undermine the findings of fact which had been made, because it might still prove necessary to reconsider a large volume of factual material in some detail. Most commonly, however, the finding of an error of law would undermine part or all of the findings of primary fact made, and necessitate further findings following, in effect, a full rehearing. It proved, in practical terms, impossible in the majority of cases for the senior immigration judge hearing the reconsideration to go on to conduct such a rehearing, because the need for such a hearing was dependent on the conclusion as to whether there was an error of law, and hence it could not be predicted in advance. Both the parties, and the sensible allocation of judicial time, would be prejudiced by the need to allow for this possibility without knowing whether it would in fact be necessary. It may be noted that the identical problem would arise

under the new structure if the Upper Tribunal does not have power to remit to the Lower Tribunal (as to which see below).

37. The solution adopted by the AIT was to adjourn such cases for so-called "second stage" reconsideration. In practice this involves a further hearing before an ordinary immigration judge. However, because this is notionally a decision on reconsideration, appeal lies directly to the Court of Appeal under section 103B of the 2002 Act. In consequence, the Court of Appeal has found itself performing the function of a first tier appellate tribunal, hearing appeals direct from the ordinary immigration judge's findings of fact. There are a large number of appeals, and a large number of them are meritorious, whilst involving no point of principle. It would be unsatisfactory for the Court of Appeal to refuse to entertain them, as is evidenced by the number of successful appeals. But it is not a sensible use of judicial time for the Court of Appeal to be deployed in this way.

38. The answer to this problem is not to impose a draconian limit on appeals to the Court of Appeal, as is permitted by section 13(7) of the 2007, but to provide, within a two-tier tribunal as previously existed, and as is now envisaged, for a sensible division of labour between the upper and lower tiers. As a matter of routine, where an error of law in the decision of the lower tribunal requires new findings of fact on questions such as credibility, the matter can be remitted to the lower tribunal for re-hearing. There is then a satisfactory opportunity for that to be reviewed for error of law by the Upper Tribunal, without either unduly burdening the Court of Appeal with routine cases, or imposing draconian restrictions on onward appeal rights.

39. Fundamentally, however, and whether or not this solution is adopted (it is stated to be a matter of debate in the Consultation Paper), it cannot be acceptable that there should be a restriction on onward appeal rights of the kind contemplated by section 13(7) of the 2007 Act, for the following reasons:

    (i) The proposals in the Consultation Paper already contain a draconian limitation on access to the higher courts in immigration cases, in so far as access to the Administrative Court is reduced or removed. That will be further exacerbated in so far as there is a transfer of immigration judicial review work to the new Tribunal.

    (ii) Most fundamentally, the adoption of such a rule, at least it if is interpreted in line with the "second appeal" rule contained section 55(1) of the Access to Justice Act

1999, would impose a wholly unacceptable restriction on meritorious cases which routinely involve fundamental rights[3].

40. If the section 13(7) restriction were to be adopted in immigration cases, there would clearly be a strong, and perhaps overwhelming, case for the court to adopt a rule that, in a case where a person was able to show a real prospect of success of establishing that their removal would breach the Refugee Convention, or some Article of the ECHR, that would itself constitute a compelling reason for granting leave to appeal under section 13(6)(b)[4]. It might also be necessary to adopt a similar rule in cases involving EU law rights[5]. It is recognised in the *Uphill* case that there may need to be a flexible approach to the restriction on second appeals depending on the provenance of the proposed appeal, and this would appear to be a clear case for the exercise of such flexibility. But that does not render the adoption of such a rule acceptable. It merely means that, on the assumption that the courts would interpret the rule as suggested, its adoption would be pointless. In the face of uncertainty as to how the Court of Appeal might interpret section 13(7), ALBA continues to have serious concerns about this possibility.

**Transfer of judicial review to the Upper Tribunal**

41. ALBA is not persuaded that it would be appropriate to transfer judicial review cases involving immigration to the Upper Tribunal. As already stated, cases involving immigration may involve profound constitutional questions, and will routinely involve adjudication upon questions of fundamental rights in a way that may have the most serious possible consequences for the individuals affected. Paragraph 213 of its Consultation Paper on the 2007 Act states:

> *The government recognises the vital constitutional role of the High Court in overseeing the actions of the executive and protecting the citizen. However, many judicial review decisions relevant to tribunals raise no such constitutional issues, instead raising ordinary legal or procedural issues which could more appropriately and conveniently be dealt with inside the tribunal system.*

42. The role of the administrative court in overseeing the administration of immigration control by UKBA (which goes well beyond its oversight of the AIT) cannot be said to be

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[3] This is obviously true in cases involving asylum, or where the ECHR is expressly relied upon. But it may be equally true in what appear to be "straight" immigration cases, where reliance is placed on the immigration rules alone, but where the immigration rule in question itself gives effect to a need to recognise the implications of a Convention right (most likely Article 8), such as application for entry clearance to join a family member.

[4] In relation to the ECHR that would appear to be required by section 3 of the Human Rights Act 1998, and in relation to the Refugee Convention because it would be the minimum necessary to ensure compliance with the UK's obligations under the Convention, which has been incorporated into UK law

[5] In order to comply with the obligation to take all necessary measures to avoid or remedy of breach of EU law obligations (*R (Wells) v Secretary of State for Transport* [2004] Env LR 27).

limited to "ordinary legal or procedural issues". It includes oversight of an exceptionally wide-ranging power to detain individuals for (in theory) indefinite periods of time under *inter alia* Schedule 3 to the Immigration Act 1971, and of a wide range of other miscellaneous powers including decisions to restrict access to appeal rights altogether. As a matter of generality, it can be said to represent a paradigm example of an area where the High Court exercises the vital constitutional role referred to in the 2007 Act Consultation Paper, and hence to fall within the class of cases in which judicial review should be retained within the High Court. Furthermore, at the time of the passage of the 2007 Act, the government gave explicit assurances that the 2007 Act would not be used to oust the jurisdiction of the High Court in immigration cases[6]. It is regrettable that the present proposal would appear to have precisely that effect.

43. ALBA therefore opposes the removal of the current statutory bar on transfer of immigration cases to the Upper Tribunal.

44. Furthermore, ALBA notes that it is very early days in terms of the exercise of its judicial review function by the new Tribunal, which will not commence for some time. The new system will take time to bed down, and it seems likely that the transfer of such functions will give rise to constitutional, jurisdictional and procedural issues of some difficulty. Immigration cases are likely to raise particular difficulties for the new Tribunal both in terms of volume of cases and complexity, and hence greatly to exacerbate the potential for confusion in the early stages. Immigration cases also give rise, more frequently than any other area of public law, for a need for urgent consideration of cases and interim relief. It is not clear that the Upper Tribunal has begun to give consideration to what procedures should be in place to deal with urgent applications. In the circumstances, ALBA considers that, even if the government were minded to contemplate the transfer of immigration judicial review, or a subset of such cases, to the new Tribunal, it would be premature for this to take place in the early days of the Tribunal's exercise of this jurisdiction. Indeed, to do so might prove a recipe for disaster.

45. ALBA therefore considers that:

(i) the statutory bar on transfer of immigration judicial review to the new Tribunal should remain, and that

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[6] See Hansard (HL) 29 November 2006 Col. 762 where Lord Falconer of Thornton assured the House that "The intention is certainly not to do by the back door that which we withdrew by the front door." See also Hansard (HL) 13 December 2006 Col GC 66-71 and 31 January 2007, Col. 248.

(ii) even if the government is not persuaded of this, it is premature to contemplate the removal of the statutory bar, which can be reconsidered once the new system beds down properly.

<u>Conclusions as to higher courts access</u>

46. For the reasons given, ALBA considers that each of the three aspects of the new proposals, taken by itself, addressed above raise issues of major concern, and that the current proposals are not acceptable.

47. Those concerns are greatly increased by the fact that all three proposals are being brought forward simultaneously. The net effect of the effective outer of judicial review of the Tribunal, coupled with restrictions on onward appeals and the transfer of potentially significant portions of judicial review cases to the Upper Tribunal itself, will be to all but cut off access to the senior judiciary for perhaps the most vulnerable group of persons in the UK. That is, quite simply, unacceptable.

<u>(B) SPECIFIC ISSUES RAISED IN THE CONSULTATION PAPER</u>

48. ALBA's major concerns arising out of the new proposals have been addressed above. In setting out those concerns, some of the issues raised in the Consultation Paper have been addressed either explicitly or implicitly. In what follows, ALBA will seek to give explicit answers to the questions raised in the Consultation.

<u>Issue (1): Specialist chambers (para 22 of the Consultation Paper)</u>

49. It would appear to be implicitly envisaged in the Consultation Paper that there would be a specialist chamber of the Lower Tribunal to deal with immigration cases. Although there would be advantages in the lower tier being integrated with other administrative appeals (for reasons given in relation to the upper tier in the next paragraph), ALBA recognises that there may be administrative difficulties with such a course given the volume of immigration appeals.

50. However, an issue raised at paragraph 22 is whether immigration cases in the Upper Tribunal should be dealt with within a specialist immigration chamber, or within the proposed administrative appeals chamber. ALBA considers that the latter is greatly to be preferred, especially if the potential benefits of bringing immigration appeals within the general structure of the new tribunal are to be fully realised. Transfer of the existing senior immigration judiciary to a specialist immigration chamber within the new tribunal would appear to achieve nothing beyond a change of label, and would

cast still greater doubt upon the propriety of designating the new chamber as a superior court of record.

**Issue (2): power of lower tier to review (para 27 of the Consultation Paper)**

51. It is not clear why it is proposed that there should be such a limited power for the First Tier tribunal to review its own decisions. It is envisaged that the general power provided for by section 9 of the 2007 Act is to be limited by procedure rules. That is not in the interests of either efficient administration or justice. In particular, a not infrequent problem arises where some procedural unfairness is occasioned by administrative error within the Tribunal. More generally, the matters which may call for such review in immigration cases are not different to those which may arise in any other area, and it is difficult to understand the justification for special treatment. Leaving the First Tier Tribunal with a power to set aside its decisions in such circumstances, and hence avoid the need for an appeal on natural justice grounds, would appear to be an efficient allocation of resources between the Upper and Lower tribunals, and should tend to expedite, rather than impede, the processing of appeals. That is consistent with the government's stated aims in the Consultation Paper.

**Issue (3): Applications for permission to appeal (paras 28 - 30 of the Consultation Paper)**

52. (a) Applications to the Lower Tribunal ALBA is inclined to agree that it is acceptable to omit the first stage of the appeal process envisaged in the 2007 Act, whereby an application for permission to appeal should, or at least, may, first be made to the Lower Tribunal. In practice such permission is very unlikely to be granted[7], and only then in cases where the Upper Tribunal would grant permission in any event. In general this is therefore an extra procedural step which would serve little purpose. It may be however that practice directions should encourage lower tribunal members to identify in their decisions where they think a difficult point of law arises which may be fit for consideration by the Upper Tier.

53. Unfortunately, it appears to be correct that this could only be achieved by primary legislation. This is not however of itself a matter of any priority.

54. (b) Applications to the Upper Tribunal In paragraph 30, it is said that:

*It is for consideration whether permission applications should always be dealt with on paper, whether there should be a right to a permission hearing, or whether an intermediate position*

[7] The exception may be in cases of administrative error of the kind considered in the previous paragraph, but such cases could be more appropriately dealt with by a robust review power under section 9 of the 2007 Act.

*should be adopted whereby a decision may take place if directed by a judge (but not at the request of either party).*

55. ALBA submits that there should be a *right* to a permission hearing, on renewed application. The importance of this stage of the appeals process for the overall integrity of the new system has been addressed above. The context is that (i) the government is considering removing the right to apply for permission from the Lower Tribunal, which will put the immigrations appeal process in a unique position *vis a vis* other parts of the Unified Tribunal, and will in itself considerably expedite matters, (ii) the government contemplates that there will no further access to the Administrative Court. Whilst the possibility of such oral renewal would not remove the concerns expressed above about access to review by a High Court judge, it would undoubtedly provide a higher level of overall safeguard. In *Sivasubramaniam,* after noting the special features of immigration appeals in paragraph 52, the court went on to observe that the possibility of an oral renewal hearing before a circuit judge provided an additional point of distinction between the IAT and the County Court, which was relevant to the High Court's exercise of its discretion to refuse to entertain challenges to such decisions by judicial review.

**Issue (4): Possibility of remittal by Upper Tribunal (para 31 - 32 of the Consultation Paper)**

56. ALBA's views on this issue follow from what have been set out above. It would appear to be a sensible use of judicial resources that, in cases where further findings of fact are needed on issues such as credibility, and where no issue of general interest arises (whether it be of law, practice or country guidance), the Upper Tribunal should remit to the Lower Tribunal[8]. That would:
    (i) ensure the efficient use of the resources of the Upper Tribunal;
    (ii) ensure an appropriate safeguard against error of law which occurs in the later findings; whilst
    (iii) safeguarding the resources of the Court of Appeal, which will not be involved, as at present, in the routine scrutiny of what would be effectively first instance decisions.

57. It may be however that, to prevent a never-ending cycle of remittals in complex or difficult cases, that there could be a rule of practice or procedure limiting the number of remittals. In cases where that limit is reached, the Upper Tribunal would itself have to go on to conduct any necessary rehearing.

[8] That could however only be acceptable if a decision of the Lower Tribunal carries a further right of appeal to the Upper Tribunal, but that appears to follow from the wording of the 2007 Act.

58. The Consultation Paper refers to the "possible" need for further primary legislation to allow for such a process of remittals. That is not understood. Section 12 of the 2007 provides the Upper Tribunal with an express power to either remit the case to the Lower Tribunal, or take the decision itself, where it identifies an error of law.

**Issue (5): Dealing with the appeal on the papers (paragraph 33 of the Consultation Paper)**

59. In the context of immigration appeals, ALBA can envisage no circumstances in which it would be appropriate for appeals to the Upper Tribunal to be dealt with on the papers, except possibly where both parties give their express consent to a remittal to the Lower Tribunal.

**Issue 6: Setting of Procedure Rules (paragraph 35 of the Consultation Paper)**

60. ALBA considers that it is vital to the integrity of any new immigration section of the Unified Tribunal, that procedure rules should be set in the same way as for the other parts of the Tribunal, namely by the Procedure Committee (as provided for by section 22 of the 2007 Act). The suggestion that, alone amongst all the constituent parts of the new Tribunal, procedure rules for immigration cases be set by the Lord Chancellor, a government minister, could not be justified.

61. No reasons are advanced in the Consultation Paper for saying that an exception should be made to the general rule that rules be set by the Procedure Committee. The Consultation Paper observes merely that:

> *While* [the Tribunal Procedure Committee model] *is appropriate for most administrative jurisdictions, the Government remains to be convinced that the Committee is the appropriate body to set procedure rules for immigration matters.*

62. It is common to all administrative law jurisdictions (and indeed, all jurisdictions) that particular areas will give rise to particular requirements. There is nothing about immigration which would make it impossible or unduly difficult for the Committee to understand the requirements which arise in immigration cases. The Procedure Committee will be composed of specialist judges from the Tribunal, who must be assumed thereby to understand those requirements precisely, and to best understand how a balance should be struck as between those requirements and the need for fairness and adequate safeguards. Furthermore, the Procedure Committee will itself include three of the Lord Chancellor's own nominees, who can ensure that his concerns are adequately understood, and taken into account, by the Committee (see paragraph 21 of Schedule 5 to the 2007 Act). The setting of procedure rules by the Lord

Chancellor, without due regard to the need for fairness, has in the past led to parts of the rules being struck down for unfairness: see *inter alia, FP (Iran) v SSHD* [2007] Imm AR 450.

63. ALBA therefore strongly opposes the suggestion that an exception should be made to the general rule that procedure rules should be set by the Tribunal Procedure Committee.