



THE OISC'S RESPONSE TO THE TRIBUNAL PROCEDURE COMMITTEE'S CONSULTATION ON PROPOSED AMENDMENTS TO THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

1. The Immigration Services Commissioner (ISC) was created under Part V of the Immigration and Asylum Act 1999 (the Act) to regulate immigration advice and immigration services provided by advisers not directly regulated by the designated professional bodies (DPBs) and to oversee the regulation of legally qualified advisers by the DPBs¹. She is supported in this by her Office, the Office of the Immigration Services Commissioner (OISC).
2. The ISC's statutory duties include the establishment and enforcement of standards and the administration of a complaints scheme. She takes action against those who are giving illegal immigration advice. The core of her regulatory activity is the requirement for advisers to register, and for the standard and quality of work by regulated advisers to be monitored.
3. The OISC takes a holistic approach to regulation, supporting applicants through the application process. One way in which we gauge the expertise of individual advisers is through competence assessments. We also audit samples of advisers' work and examine their organisational structures, policies and procedures to understand their advice giving service.
4. The Commissioner is under a statutory duty to ensure, as far as is reasonably practicable, that those who provide immigration advice or immigration services are fit and competent to do so, act in the best interests of their clients, and do not seek to abuse any procedure operating in the United Kingdom in connection with immigration or asylum (section 83(5)(a), (b) and (d) of the Act).

¹ Since 1st April 2011 the Commissioner's regulatory oversight responsibilities with regards to the Law Society of England and Wales, the General Council of the Bar and the Institute of Legal Executives has transferred to the Legal Services Board. The Commissioner retains regulatory oversight of DPBs operating in Scotland and Northern Ireland.



The Consultation's Proposals

5. The consultation concentrates on two main proposals:
 - i. Fees under Rule 28A(1) and Rule 8; and
 - ii. Representatives under Rule 11 with “Fresh Claim Judicial Reviews” (FCJRs) taking place at the Upper Tribunal (UT) instead of the High Court.

The Commissioner is responding only to the second proposal.

6. OISC regulated advisers are currently not allowed to undertake any form of Judicial Review work because of the provisions of the Legal Services Act 2007. The consultation asks whether these advisers should be allowed rights of audience for FCJR cases (paragraphs 29 to 37). An amendment to the Tribunal Procedure Rules 2008 – Rule 11 is proposed. The proposal indicates how the UT Rules might be amended if the Committee was to decide to restrict FCJR representation to persons with the right to represent parties in Administrative Court proceedings. The effect of such an amendment would be that, while individuals could continue to act in person, rights of representation would be confined to legally qualified persons who have the right to conduct litigation in the Administrative Court. Other persons, including those regulated by the OISC, would continue to be unable, as they are now, to act as a representative in FCJR proceedings in the Upper Tribunal or to address the Upper Tribunal in FCJR hearings.
7. The Tribunal Procedure Committee explains that it has not formed a view on the best way forward on this issue or concluded that concerns regarding the quality of representation, if the restrictions are relaxed, are justified. They have invited views on these matters.
8. **The Commissioner's view is that it would be desirable to allow OISC regulated advisers with sufficient experience to undertake FCJR applications. There is, however, currently no mechanism in place to train advisers and assess their competence to represent applicants in FCJRs. The Commissioner would therefore support an application to change Rule 11 to allow regulated advisers authorised to give advice at the appropriate OISC Advice Level to appear once these mechanisms are satisfactorily established.**



Discussion

9. The three OISC Advice Levels are:
 - Level 1 – Initial advice
 - Level 2 – Casework
 - Level 3 – Advocacy and representation

10. Under the regulatory scheme only Advice Level 3 advisers are allowed to appear before the Immigration and Asylum Chamber. The proposals will therefore have the greatest impact on them. As of March 31st 2011 there were 513 Advice Level 3 organisations out of a total of 1,851 regulated organisations.

11. Whilst a Regulatory Impact Assessment was not issued with the consultation, the OISC appreciates the need to reduce overall public costs. This is consistent with the proposals contained in the November 2010 consultation, *The Reform of Legal Aid in England and Wales*. Further, Sir Anthony May, President of the Queen's Bench Division, in evidence to the Commons' Justice Select Committee on 3rd April 2011 stated that 5,000 reconsideration applications were lodged annually by asylum applicants about to be flown home. He called for legal aid for "last-ditch" asylum seeker appeals to be scrapped because so many, in his view, had "no merit".

12. We understand that the cost of each judicial review case ranges from £10 - 20k. Given Sir Anthony's estimate, there is the potential of a £100m bill associated with these "last-ditch" claims. Considering this, it is important for savings to be made bearing the mind the need not to jeopardize the quality of proceedings.

13. The proposal, as outlined in paragraph 6 above, seeks to maintain the status quo in what are changed circumstances. The Commissioner fears the proposal may lead to the "judicialisation" of the Tribunal system, making it more formal and the province solely of lawyers. This will probably lead to significantly greater costs to applicants. These factors all seem contrary to the ethos of the tribunal system and the "access to justice" initiative.

14. As stated above, the ISC is under a statutory duty to ensure that all advisers regulated by her are, so far as is reasonably practicable, fit and competent to provide immigration advice or services. There is also a duty to promote good practice. To this end the OISC assesses the skills and experience of



regulated advisers at each Advice Level and when they initially apply to enter the scheme. Further, regulated advisers are subject to an audit regime where they are interviewed at their premises and a review done of a sample of their case files. The OISC also requires all regulated advisers to undertake an annual programme of Continuing Professional Development (CPD). Currently, however, these processes of assessment and review do not include elements that relate to FCJR

15. The ISC, subject to resource and time constraints, would be pleased to put in place the necessary processes to assess the competence of those advisers who wished to present FCJR applications. She would have to undertake further work to ensure that the OISC's Competence Assessment, CPD and audit regimes were able to cope with these additional demands. This would require consultation with interested parties.

16. Notwithstanding the above, allowing regulated advisers with sufficient expertise to make FCJR applications would, in the ISC's opinion, be a desirable outcome for the immigration advice sector, the tribunal service and the public purse.

Suzanne McCarthy
Immigration Services Commissioner

6th June 2011