RESPONSE OF THE FACULTY OF ADVOCATES

to the

Ministry of Justice proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal

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The Faculty of Advocates

1. The Faculty of Advocates is the independent body of lawyers admitted to practise as Advocates in Scottish courts. Members of the Faculty of Advocates are also authorised to appear in the Immigration and Asylum Chamber of the Upper and First-tier Tribunals across the UK and the UK Supreme Court. Its members include Advocates with considerable experience of statutory appeals across the different chambers of the UK tribunal system. This includes members with experience acting as representatives of appellants and as representatives of respondent government departments.

Initial comments

2. This consultation relates to proposals which primarily relate to England and Wales.

3. However, the consultation is relevant to Scotland as: (1) one proposal (Question 5) relates explicitly to tests applied in applications for permission to appeal to the Court of Session; and (2) the Court of Session and the Court of Appeal in England and Wales (as well as the Court of Appeal in Northern Ireland) perform identical functions in the single UK-wide statutory appeals system created by the Tribunal Courts and Enforcement Act 2007 so changes to the regime in England and Wales must be considered in a UK context; and (3) the test to which changes are proposed is identical to the equivalent test applied by the Court of Session in considering applications to appeal from the Upper Tribunal to the Court of Session so evidence from Scotland is relevant when assessing the effectiveness of the test.

4. Responding to this consultation has been made more difficult as the statistics presented as evidence are unclear, presented without context or clear definitions, and seem to contain errors, as exemplified in our observations at paragraph 9 below. Our view is that the evidential basis as set out in the consultation document is inadequate to allow proper consideration of the proposals and, unless other figures not disclosed in the consultation are held by the Ministry of Justice, insufficient for justifying the potential interference with the right of appeal of individuals against decisions made by government bodies.

5. If the Ministry of Justice is determined to press ahead with reforms to the test for permission to appeal, it should produce comprehensive and properly presented evidence of the need for such reforms to allow appropriate examination and scrutiny.

Q1: Do you agree that there should be a stricter and narrower test applied to applications to the Court of Appeal for permission to appeal in a second appeal from the Upper Tribunal to the Court of Appeal?

6. No. The Faculty is not persuaded that the proposed change to the "second appeal" test for permission to appeal is justified on the evidence contained within the consultation document or that the proposed change would achieve the policy objectives. As the Faculty understands the proposal, the stricter and narrower test is only to be applied by the Court of Appeal when considering an application for permission to appeal. The existing "second appeal test" would continue to be applied when the Upper Tribunal was considering the application.

7. There are two related issues regarding "second appeals" from the Upper Tribunal to the Court of Appeal. Firstly, that too much of the Court of Appeal's time is spent considering applications for permission to appeal, most of which are refused. Secondly, that the Court of Appeal is overburdened by appeals in which permission is granted but which are ultimately unsuccessful.

Inadequacy of the evidence base

8. In our view, the evidential basis within the consultation document is vague and lacking in any rigour. The only figures cited in the document are:

    8.1. That 561 applications for permission to appeal ("PTA") were determined, of which 92 were granted.

8.2. That, of the appeals granted permission, 27 were successful.

9. The first of these figures is expressed differently in three different places. In the first paragraph of p4 of the foreword to the consultation document, this figure is said to refer to PTA applications "determined in the Upper Tribunal (Immigration and Asylum Chamber)" in 2019. In paragraph 42 of the consultation document the same figure is said to refer to PTA applications determined by the Court of Appeal in 2018. In paragraph 13 of the evidence base in the Impact Assessment, the same figure is attributed to applications determined by the Court of Appeal but in 2019. At the very least, these apparent discrepancies represent a concerning lack of rigour in the assembly and presentation of evidence to support the proposed changes.

10. The second figure is also vague. No figure is given for the total number of substantive appeals which were decided, or which were "unsuccessful", in the relevant period.[1] It is not clear what has been counted as "success". For instance, if the respondent department withdraws a challenged decision or concedes an appeal prior to a substantive hearing, there is no substantive hearing at which the appellant is successful. If such cases are excluded from the definition of "success" then the success rate of appeals may be severely understated by the figures given. If such cases are included in "success", then it is misleading to treat them as cases which have added to the workload of the Court of Appeal as success came without the requirement for a substantive hearing. It is also unclear how appeals which are successful in part have been treated.[2]

11. It is also unhelpful that there is no breakdown of the success rates of applications or appeals by whether they were brought by appellants or respondent government departments. In the absence of such evidence, it seems unsafe to assume that any issue with unmeritorious applications or appeals is due solely to such applications being brought by the original appellants and never by respondent government departments.

12. We also note that there is no breakdown within the statistics of the reason for which applications or appeals were refused. The consultation document asserts that the data

[1] Because of the time taken (the consultation paper indicates 18 months, on average) to dispose of a full appeal once permission is granted, the 92 appeals in which permission was granted in the relevant period cannot be the same appeals of which only 27 were "successful".

[2] For instance, an appellant may be "successful" in persuading the Court of Appeal to uphold a point of law disputed by the respondent government department but still fail on the facts of his or her individual case.

suggests that there is "misuse of the system by those … bringing hopeless challenges". We consider that it is wrong to assume that refusal of an application means that it was necessarily "hopeless". It is therefore unclear that there is any evidential basis there is for the assertion that there is widespread abuse by practitioners.

13. Furthermore, we note that it is not stated how many applications for permission to appeal to the Court of Appeal were granted or refused by the Upper Tribunal or what the "success rate" of those appeals was (for comparison to the "success rate" for those refused permission by the Upper Tribunal but granted permission by the Court of Appeal). These would seem to be important indicators of where any problem lies and therefore where any solution should be focussed.

14. Finally, we consider that it is a fundamental flaw with the proposal that no comparable figures are given for applications for permission to appeal in relation to cases commencing in Chambers other than the Immigration and Asylum Chamber. The policy objective appears to be driven by appeals from cases commencing in that Chamber but the proposed change would affect a far wider range of appeals. There is no evidence at all in the consultation document for extending the proposal beyond appeals arising in the Immigration and Asylum Chamber.

15. In the absence of robust statistics, the true impact of the proposed alterations to the Court of Appeal procedure could be assessed by having an appropriate small panel (possibly of recently retired Court of Appeal Judges) consider how many, if any, of applications granted Permission would also pass the new proposed test. The impact of this alteration can be properly assessed by such a mechanism.

The number of applications for permission to appeal

16. The first complaint is that considering applications for permission to appeal ("PTA") takes too much of the Court of Appeal's time when permission is only granted in 16% of cases.

17. The logical flaw in this assertion is immediately apparent. If too many challenges are brought which fail the test, then the problem lies not with the test for permission but with (1) the ease or lack of consequences for practitioners for making applications which are unlikely to succeed; and/or (2) the efficiency of the court's processes for identifying and sifting out hopeless applications from those that merit detailed consideration.

18. The consultation document states that the appeal system is being misused by persons who seek an advantage in delay by bringing hopeless challenges.[3] The Faculty does not seek to comment on the position in England and Wales, but it does not consider that there is evidence of the appeal system being misused in Scotland in this way. A member of the Faculty of Advocates would be open to disciplinary action if he or she took unmeritorious appeals with the sole aim of creating delays. However, if, as the consultation document suggests, there is abuse of the system by those bringing hopeless challenges, then the proper solution is not to cut off the right of appeal for otherwise potentially meritorious challenges, but to improve the court's ability to identify those unmeritorious challenges and ensure that those who repeatedly bring them, in defiance of their professional duties, face the appropriate professional consequences. After all, if the court's efficiency is hindered by unscrupulous practitioners bringing hopeless challenges under the current test; what will prevent those same unscrupulous practitioners continuing to bring equally hopeless challenges under the proposed new test?

The number of appeals in which permission is granted but which are unsuccessful

19. The second complaint is that too many cases proceed to substantive hearings, consuming the Court of Appeal's valuable time, when only "a very few" are successful. It is alleged that the current test threshold is "not strict enough to prevent misuse of the system by … hopeless challenges".[4]

20. We have already commented on the issues with the figures presented in the consultation document. But, taking them at face value and assuming it is safe to infer that the number of appeals which were determined in the relevant period was around the same number as the number of applications which were successful in the period, 27 appeals out of 92 being successful is a rate of approximately 30%. We do not accept that this is accurately characterised in the consultation document as "very few" of the appeals which reach the substantive stage.

21. Furthermore, at the Court of Appeal level, where cases turn on decisions about important legal questions, it is wrong to measure the benefit of deciding appeals simply by reference to the "success rate" for individual appellants. Even appeals which are dismissed will

[3] Paragraph 28.
[4] Forward to consultation document, p4, first paragraph and Paragraph 28 of consultation document.

contribute to developing or clarifying the law or correcting the Upper Tribunal's approach on certain matters.

22. It follows that we do not agree with the consultation document that the statistics show that too many applications for permission to appeal are granted. Even if a "success rate" of 30% is the correct figure (and we note it seems considerably lower than in the Court of Session, a matter discussed further below), we do not accept that this figure represents a clear case that court resources are being used ineffectively.

23. In any event, the argument made in the consultation document is logically incoherent. The test for permission to appeal is already high. For each appeal where permission is granted, the Upper Tribunal or Court of Appeal must have been satisfied that the existing PTA test of (i) real prospects of success, and (ii) important point of principle or practice/other compelling reason for the appeal, was satisfied.[5] It follows that "hopeless" appeals should already be weeded out at the application for permission stage. Even if 70% of appeals were ultimately unsuccessful then, if the existing test is operating correctly, those unsuccessful appeals were almost certainly not "hopeless challenges". If the problem is, as the consultation document asserts, that too many "hopeless" cases proceed to substantive hearings, then the issue is not with the formulation of the test for permission but with the operation of it.

24. If the Court of Appeal is concerned that unmeritorious cases were reaching the substantive stage, we would expect that the Court of Appeal would reflect this in written decisions and or guidance provided to those judges deciding permission to appeal. We are not aware of any such judicial dicta or guidance and note that the consultation document provides no examples of any. In the absence of such evidence from the Court of Appeal itself, we do not consider that the bare statistics presented in the consultation document establish that (1) there is a problem with the existing test for permission; or (2) if there is, that the problem is best rectified by modifying the test rather than correctly applying the existing test.

Comparison with Scotland

25. Exactly the same test is applied by the Court of Session for the grant of PTA where it is the relevant court as is currently applied by the Court of Appeal. It is therefore instructive to

[5] "Compelling" means legally compelling. This is a very high test (see, for example, *SA v SSHD* 2014 SC 1 at [44]). There is no route for unmeritorious cases no matter how emotionally compelling they may be.

compare the statistics quoted in the consultation with those which pertain to Scotland. If the problem lies with the formulation of the test (rather than its application by the courts or practitioners), similar difficulties would be expected in Scotland as the consultation document alleges exist in England and Wales.

26. The statistics for applications for PTA from the Upper Tribunal to the Court of Session, and substantive appeals from the Upper Tribunal to the Court of Session were obtained by a Freedom of Information request and are as follows:

PTA Applications	**YE 31/3/18**	**YE 31/3/19**	**YE 31/3/20**
Lodged	30	27	39
Granted	14	12	10
Refused	9	6	13
Withdrawn	1	1	0
Dismissed	6	8	14
Outstanding	0	0	2

Appeals	**YE 31/3/18**	**YE 31/3/19**	**YE 31/3/20**
Lodged	13	12	10
Granted	10	9	7
Refused	2	1	0
Outstanding	1	2	3

27. The statistics for Scotland support the conclusion that the issue is not with the test for permission but with the application of the test by practitioners and the court. In the years ending 31 March 2018 and 2019, just under half of all applications for permission to appeal were successful (compared to the 16% quoted for England and Wales in 2019).[6] And the vast majority of appeals in which permission was granted were successful (26 appeals allowed with only 3 refused over the past 3 years).

28. In our view, the apparently unproblematic operation of the same test in Scotland demonstrates that the correct approach to any perceived issue is not to restrict the right of appeal by restricting the test for permission to appeal.

[6] This figure dipped to 25% in the year ending 31 March 2020 but there was an unusually high number of applications dismissed on the Appellant's motion. That may suggest that a number of applications were dismissed after a previous application or appeal resolved a particular point leading to the abandonment or concession of similar appeals.

Conclusion

29. The current proposals do not provide an adequately reasoned or evidentially sound basis for amending the test for permission to appeal from the Upper Tribunal to the Court of Appeal.

Q2: Do you agree with the proposal to amend the current test so that it requires the application to demonstrate that it raises matters of exceptional public interest? Please give reasons.

30. The Faculty does not agree with the proposal.

31. As stated above, the issue appears to be with the operation of the current test, not that the current test is too lax.

32. In any event, the test of "exceptional public interest" is unhelpfully vague and subjective. It is clearly in the public interest that justice is done and that the law is developed; but it is also in the public interest that the courts operate efficiently and effectively without being clogged up with unmeritorious appeals. The proposed test gives no guidance as to how these conflicting aspects of the public interest are to be weighed in individual cases. Neither is "exceptional" a term that a court will find easy to apply in the context of an individual application. The Faculty notes that the criteria for permission to appeal to the Supreme Court from the Court of Session is that the appeal raises a point of law of "general public importance". The proposed use of the adjective "exceptional" appears to impose a more restrictive test than applies even on appeal to the Supreme Court.

33. It could be argued that the current test (an important point of principle or practice not previously determined or other legally compelling reason) is already a test that is only met with difficulty and when it is necessary to clarify the law governing the compliance of the UK's immigration and asylum regime with international law and human rights obligations, a matter which is clearly in the public interest.

34. There is a significant danger replacing a clear and reasonably well-understood test with a vague and subjective test that leads to more, rather than less, lengthy or complex arguments over the threshold for the grant of permission. In the short-term, this is a virtual certainty.

35. The proposal envisages that if the Upper Tribunal is uncertain whether to grant or refuse permission to appeal, the Tribunal may refer the application for determination by the Court of Appeal.[7] One possible consequence of the proposed change will be that the workload of the Court of Appeal will actually increase as the Upper Tribunal will be inclined to see the Court of Appeal as being best placed to determine which appeals are of "exceptional public interest". In the same way that the Court of Appeal generally leaves it for the Supreme Court to determine which appeals should proceed to be heard by the Supreme Court, the Upper Tribunal may develop a reluctance to determine the "exceptional public interest" issue on behalf of the Court of Appeal. This change would also undermine the Upper Tribunal's role as a specialist Tribunal, equivalent in status to the High Court in England and Wales or the Outer House in Scotland.

36. We also consider that the proposals would introduce a difference between the test applied to essentially the same application when considered by the Upper Tribunal and when subsequently considered by the Court of Appeal. This creates a category of application (which may represent up to 85% of applications currently made)[8] where an appeal is said to meet the existing test (which would continue to be applied by the Upper Tribunal) but would fail the more stringent test (which would be applied by the Court of Appeal). It may well be that appellants who believe their applications have been wrongly refused by the Upper Tribunal but who accept that they cannot satisfy the more stringent Court of Appeal test would instead seek judicial review of the Upper Tribunal's refusal of permission. This already occurs where the Upper Tribunal refuses permission to appeal against decisions of the First-tier Tribunal (a decision by the Upper Tribunal against which there is no statutory right of appeal). Thus, some of the existing applications to the Court of Appeal would not disappear but simply be transferred to the High Court in a different form.

37. Finally, the current proposals take no account of the distinction that would be introduced between the test for permission to appeal in England and Wales as compared to that in Scotland. Elsewhere the consultation document (rightly in our view) argues there should be no such difference.

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[7] Para 26.

[8] This is based on the figures in Table 1 on at paragraph 54 of the Impact Assessment which suggest that the proposed changes would reduce the number of applications to the Court of Appeal by 480 to 506 per year against a figure of 561 given as the number per year under the current test.

Q3: For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal do you agree that the right to apply to the Court of Appeal for permission to appeal be removed?

38. Applications for judicial review transferred from the Court of Session operate under a different procedure to that described in the consultation document. There appears to be no proposal to change the procedure for transferred Scottish judicial reviews. We make no comment on this question.

Q4: For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal, do you agree that there should be a right of review before a second Upper Tribunal judge?

39. Applications for judicial review transferred from the Court of Session operate under a different procedure to that described in the consultation document. There appears to be no proposal to change the procedure for transferred Scottish judicial reviews. We make no comment on this question.

Q5: Do you agree that the "second appeals" test should be applied by the Upper Tribunal when considering an application for permission to appeal to the Court of Session?

40. Yes.

41. It is tolerably clear that the difference in tests between that applied by the Upper Tribunal in Scottish appeals and that applied by the Upper Tribunal in non-Scottish appeals is an unintended consequence of the legislative history of the 2007 Act. There is no real justification for a different test to be applied at Upper Tribunal level and at Court of Session level.

42. When originally enacted, section 13 of the Tribunals Courts & Enforcement Act 2007 did not contain any "second appeal" test relating to Scotland. Section 13(6A) was first introduced by the Crime & Courts Act 2013, section 23 with effect from 15 July 2013. Section 13(6A) was further amended to take its current form by virtue of the Criminal Justice & Courts Act 2015, section 83(2). This provides for the rules of court of the Court of Session to include a "second appeal" test which can be found in rule of court 41.57. However, this rule of court only covers PTA being considered by the Court of Session. There is no corresponding provision which requires the Upper Tribunal to apply the "second appeal" test when considering PTA to the Court of Session. The existence of this anomaly is confirmed by a comparison with the position of the Upper Tribunal in Scotland when dealing

with appeals in devolved matters. In devolved appeals, the primary legislation is the Tribunals (Scotland) Act 2014 and the relevant rules are the Upper Tribunal for Scotland (Rules of Procedure) 2016/232. The "second appeal test" for PTA can be found within section 50 of the 2014 Act and it applies whether the application is being determined by the Tribunal itself or the Court of Session.

43. The Faculty agrees with the government's proposal to rectify this inconsistency. However, the Faculty does note that the proposals for England and Wales are to introduce a different test for PTA depending on whether the application is being determined by the Upper Tribunal or the Court of Appeal. While there may be different factors at play in England and Wales which justify the different tests, the Faculty does highlight that it might appear odd to be rectifying an inconsistency in Scotland while introducing an inconsistency in England and Wales. The Faculty also questions whether there is a justification for the UK government to legislate for different appeal tests to be applied in different parts of the UK for Tribunals dealing with reserved matters.

Q6: Do you agree with the assumptions and conclusions outlined in the Impact Assessment? Please provide any empirical evidence relating to the proposals in this paper.

44. The impact assessment acknowledges that the proposals are likely to have disproportionate impact on those with protected characteristics (specifically race and disability). The impact assessment concludes that such impact is justified on the basis that there "is a good case for the proposed reforms".

45. In our view, there is a lack of robust evidence base and coherent logic in the proposals. We have endeavoured to set out some of the difficulties in our analysis above.

46. The proposals should not proceed without clearer justification.

47. The Court of Appeal's ability to decide important points of principle or practice allows it to develop and clarify the law and provide guidance to the Upper Tribunal. Hence, a single decided appeal in the Court of Appeal, even an "unsuccessful" one, may assist in the swifter resolution of tens or hundreds, sometimes even thousands, of appeals on related points at the First-tier and Upper Tribunal level over succeeding years.

48. The impact assessment takes no account of the possible increase in complexity or length of appeals at lower levels if the Court of Appeal's ability to develop and clarify the law is removed.

49. The impact assessment also takes no account of the potential increased workload in the High Court if appellants who are unable to satisfy the more stringent test applied by the Court of Appeal instead seek judicial review of the Upper Tribunal's refusal to grant permission to appeal on the existing test.

Q7: From your experience are there any groups or individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper? We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about litigants in the Court of Appeal, and their protected characteristics.

50. We do not have any specific evidence to contribute. However, we agree with the assumption in the impact assessment that there will be a disproportionate impact on those with protected characteristics. Such people are likely to be very substantially over-represented in those whose rights of appeal are curtailed by these proposals.

Q8: What do you consider to be the equalities impacts on individuals with protected characteristics of each of the proposals? Are there any mitigations the Government should consider? Please give data and reasons

51. We do not have any specific comment on this point. However, we agree with the assumption in the impact assessment that there will be a disproportionate impact on those with protected characteristics. Such people are likely to be very substantially over-represented in those whose rights of appeal are curtailed by these proposals.

Q9: What do you consider to be the impacts on families of these proposals? Are there any mitigations the Government should consider? Please give data and reasons

52. We do not have any specific evidence to contribute. However, we agree with the statement in the consultation document that these appeal routes are often used by those seeking to vindicate their right to a family life. Curtailing the rights of appeal as proposed in this consultation document is likely to have an adverse effect on families and on the ability of the Court of Appeal to develop the law in this area and maintain proper supervision of the Upper Tribunal's exercise of its judicial functions.