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UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER
FIRST-TIER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

JOINT PRESIDENTIAL GUIDANCE 2019 No 1: Permission to appeal to UTIAC

This guidance is issued under paragraph 7 of Schedule 4 to the Tribunals, Courts and Enforcement Act 2007. It replaces the guidance note 2011 No 1, as amended in 2013 and 2014.

1. The guidance is for judges considering whether to grant permission to appeal from a decision of the First-tier Tribunal IAC to the Upper Tribunal. It is also intended to inform interested parties

2. The consideration of an application for permission to appeal is a judicial decision for the individual judge performing it. The guidance does not modify or replace the legal obligations of a judge considering such a matter.

3. The guidance is, in particular, intended to assist judges in their task by drawing attention to case law and commonly occurring issues, as well as reflecting the experience of those judges who have been undertaking this function, whether as judges of the First-tier Tribunal or the Upper Tribunal.

4. The guidance may be modified or withdrawn in the light of case law and of legislative and other relevant developments.

5. We are grateful to Upper Tribunal Judge Rintoul for his work in preparing this guide.

The Hon Mr Justice Lane
President, UTIAC
Mr Michael Clements
President, FtTIAC
August 2019

PERMISSION TO APPEAL GUIDANCE

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GUIDANCE NOTE ON PERMISSIONS TO APPEAL (PTA)

Introduction

1. This guidance note aims to assist those making applications for permission to appeal (PTAs) to the Upper Tribunal (Immigration and Asylum Chamber) (UT) and those considering them. It also aims to address problems which often arise. It is not a source of law or an authoritative statement of law. Its purpose is to promote consistent and high standards in making decisions on PTAs.

2. The guidance covers both applications for PTA to the UT made to the FtT ("applications to the FtT") and applications for PTA made to UT ("applications to the UT"). Applications to the FtT are considered under the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ('the FtT Rules'). Applications to the UT are considered under the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Rules'). These two sets of Rules are different in various material respects and so parts of this guidance will only be relevant to one or other of these applications.

The statutory regime (including review)

3. Section 9 of the Tribunals, Courts and Enforcement Act 2007 ("the TCEA") gives the FtT the power to review a decision made by it on a matter in a case. The FtT can use this power acting on its own initiative or if one of the parties asks it to do so. The FtT's power to review a decision is subject to the FtT Rules.

4. This guidance note is concerned with the process of deciding whether to grant permission to appeal. It is, however, very important to be aware that rule 34 of the FtT Rules requires the FtT, when it receives an application for permission to appeal, first to consider whether to review the decision in accordance with FtT rule 35. These procedures are the subject of separate guidance published by the First-tier Tribunal (Guidance to First-tier Tribunal Judges on the set aside rules in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014). It is only if the FtT decides not to review the decision concerned or reviews that decision and decides to take no action in relation to that decision or part of it, that the FtT must consider whether to give permission to appeal (FtT rule 34(1), (2)). A review may be undertaken only where the judge is satisfied that there **was** an error of law in the decision being challenged FtT (rule 35(1)(b)). The decision whether to grant PTA involves the question whether the challenged decision **arguably** involved an error of law.

5. Section 11(2) TCEA gives any party to an appeal a right to appeal a decision to the UT subject to two conditions:

   (i) The right of appeal is only "on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision" (TCEA, s.11(1)); and,

   (ii) The right of appeal can only be exercised with permission (or Northern Ireland leave) granted either by the FtT or the UT.

6. If the FtT refuses permission to appeal, refuses to admit the application or grants permission only on limited grounds, the party who made the application can then make an application to the UT for permission to appeal (UT rule 21(2)).

Structure of the decision-making process

7. The initial task of the judge considering an application to the FtT for PTA is different in kind from that of the judge considering an application to the UT for PTA. Before considering whether to grant an application the judge of the FtT (1) will decide whether there is any basis for exercising powers to set aside the FtT decision (for clerical error or other accidental slip or omission or administrative error on the part of the Tribunal or its staff (FtT Rules, r. 32)); and (2) must decide whether to review the FtT decision (either for correction of accidental errors, amendment of reasons or set aside): see s.9 TCEA; FtT Rules, r. 35 and paragraph 4 above.

8. It is advisable to take a structured approach to deciding an application. Clearly, some of the issues set out below will arise only rarely, but need to be borne in mind.

   (i) Is the application within time?

   (ii) Did the FtT have jurisdiction to consider the appeal?

   (iii) Is the challenge to an excluded decision?

   (iv) Should the decision be reviewed (FtT only)?

   (v) Should permission to appeal be granted?

   (vi) If so, in part only?

   (vii) How should the decision be drafted?

Timeliness

9. Rule 33(2) of the FtT Rules provides that an application for permission must be received no later than 14 days (or, if the person is outside the United Kingdom, 28 days) after the date on which the party making the application was sent written reasons for the decision[1]. Unlike the position under the previous FtT Rules, the 2014 Rules do not contain a specific general requirement for the FtT to refuse to admit an application for permission to appeal which is received late, unless the interests of justice otherwise require. The only situation where the FtT Rules impose such a requirement is where an application for a written statement of reasons for the decision under challenge has been, or is, refused because **that** application was received out of time (FtT rule 33(7)).

10. Where the FtT decides not to extend the time limit within which application must be brought, there is nothing in the FtT Rules that prevents it from refusing to admit that "late" application rather than refusing permission. As stated in Bhavsar (late application for PTA:procedure) [2019] UKUT 196, the FtT should, in such a case, refuse to admit the application. This will mean that any subsequent (or "renewed") application to the UT for PTA will be subject to rule 21(7) of the UT Rules, whereby the UT must only admit the application made to it (whether or not **that** application was in time) if the UT considers it is in the interests of justice for it to do so: see paragraph 18 below.

11. An application for permission to appeal to the UT must be received by it no later than 14 days (or one month if the person is outside the United Kingdom – rule 21(3)(b)) after notice of refusal of permission was sent (rule 21 (3)(aa)(i)). In this, as in all other aspects of the process, the parties are required to comply with the rules. Procedural rigour is to be applied at all stages – see R (Talpada) v SSHD [2018] EWCA Civ 841

12. Under both sets of procedural rules a person whose application is out of time should make an application for an extension. A failure to do so does not, however, make any subsequent grant invalid – see NA (Bangladesh) v SSHD [2016] EWCA Civ 651. If the application to the FtT was not admitted because it was not made in time, any renewed application to the UT must explain the reason for **that** lateness: UT rule 21(7).

13. In considering whether to exercise discretion to extend time for seeking permission to appeal to the Upper Tribunal, both the First-tier Tribunal and the Upper Tribunal should apply the approach commended by the Court of Appeal in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537;

[1] The word "sent" was substitute for "provide" by para 4 of the Tribunal Procedure (Amendment) Rules 2018 (SI 2018/511) with effect from 14 May 2018.

Denton v White [2014] EWCA Civ 906 and R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633.

14. This requires a three-stage approach:

(i) Identifying and assessing the seriousness or significance of the failure to comply with the time limit. If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages; but if the judge decides that the breach is serious or significant, then the second and third stages assume greater importance.

(ii) Considering whether there is a good reason for the delay. If so, the judge will be likely to decide that relief should be granted. The important point made in Denton is that if there is a serious or significant breach and no good reason for the breach, this does not mean that the application for relief will automatically fail. It is necessary in every case to move to the third stage.

(iii) The judge must evaluate all the circumstances of the case, so as to deal justly with the application. The need for litigation to be conducted efficiently and at proportionate cost is a particular factor. The substantive grounds will be relevant only if they are very strong or very weak.

15. Further guidance, based on Mitchell, Denton and Hysaj, is identified in R (on the application of Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing: principles) IJR [2016] UKUT 185 (IAC):

(i) There is no merit in constructing a special rule for public authorities; they have a responsibility to adhere to the court's rules even if their resources are 'stretched to breaking point' [42];

(ii) A solicitor or public body having too much work will rarely be a good reason for failing to comply with the rules [42];

(iii) Particular care needs to be taken in appeals concerning claims for asylum and humanitarian protection to ensure that appeals are not frustrated by a failure by a party's legal representatives to comply with time limits. The nature of the proceedings and identification of responsibility for a failure are matters to be considered at the third stage of the process [42];

(iv) The inability to pay for legal representation cannot be regarded as providing a good reason for delay [43], nor can the fact that that the party is awaiting a decision on legal aid.

(v) In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered at stage three of the process [46].

16. The default position is that an extension should not be granted; it is for the party seeking it to justify the exercise of discretion. The procedural rules also require an explanation for delay; in its absence, it is not for a judge to speculate as to what that might be.

17. As was stated in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC), the longer the period of non-compliance, the stronger the reasons to extend time must be. Whilst each case must be determined on its own facts, given the strict time limits in immigration appeals generally and the reason behind those time limits, the expectation is that it will be an exceptional case where permission to be appeal should be granted where there has been a significant delay in filing an application; significant delay would certainly include any period more than 28 days out of time.

Timeliness issues arising in an application to the UT

18. The UT Rules permit an application for permission to appeal even if the FtT has not admitted the decision (because of a refusal to extend time) see UT Rules, r.21(2)(b), but in this case the UT must only do so where it considers that it is the interests of justice (r.21 (7)(b)). See further para 21 below.

19. The UT may waive any irregularity in a failure to comply with the provisions of the UT Rules (r.7(1)) and has case management powers to extend or abridge time (r.5). The considerations set out in paragraphs 14 to 17 above are always relevant.

Jurisdiction

20. A decision of the First-tier Tribunal may be to the effect that the Tribunal did not have jurisdiction to entertain what purported to be an appeal. Unless that decision is in the form of a preliminary decision, that is one not taken at a hearing (as to which see below: excluded decisions), this jurisdictional

decision is appealable to the UT[2]. So too is a decision that a party says is wrong in law because the First-tier Tribunal did not have jurisdiction.

21. The issue of whether either the FtT or the UT has jurisdiction may also occur when an appellant has left the United Kingdom or been granted leave to remain and so by operation of section 92(8) or 104(4A) of the Nationality, Immigration and Asylum Act 2002 respectively, the appeal is deemed abandoned.

Excluded Decisions

22. Excluded decisions are defined in s.11(5) TCEA and orders made under s.11(5)(f). The current order is the Appeals (Excluded Decisions) Order 2009 SI 2009/275, which for our purposes provides that the following are excluded decisions:

(i) Asylum support appeals under s.103 Immigration and Asylum Act 1999.

(ii) Decisions made in connection with bail applications under Schedule 10, Immigration Act 2014.

(iii) Any procedural, ancillary or preliminary decision made in relation to appeals under s 40A of the British Nationality Act 1981, ss.82 of the Nationality Immigration and Asylum Act 2002 or regulation 26 of the Immigration (EEA) Regulations 2006. By operation of Schedule 7 paragraph 1 of the Immigration (EEA) Regulations 2016, the reference to the 2006 Regulations is deemed to include a reference to the 2016 Regulations.

23. A decision not to accept a notice of appeal for absence of jurisdiction under r. 22 of the FtT Rules is one kind of preliminary or procedural decision, as is a decision that the original appeal is out of time and time is not to be extended (r.20(6)).

24. Although procedural, ancillary and preliminary decisions are not defined, Parliament's policy, as set out in the Excluded Decisions Order, is to limit appealable decisions in immigration appeals to final decisions of the FtT[3]. There is authority from Singh v SSHD [2014] EWCA Civ 438 to the effect the fee awards and costs awards are ancillary.

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[2] Bahinga (r. 22; human rights appeal; requirements) [2018] UKUT 90 (IAC).

[3] R (on the application of the Secretary of State for the Home Department) v First-tier Tribunal (Immigration and Asylum Chamber) (Litigation Privilege; First-tier Tribunal) [2018] UKUT 243 (IAC) at [27]

Assessing the grounds

25. Appeals come to the FtT in a variety of circumstances, including claims to international protection in the UK under the Refugee Convention, Humanitarian Protection under the EU Qualification Directive and claims under the European Convention on Human Rights. Wherever life, limb or liberty may be placed in jeopardy or important human rights may not be respected, the approach of the higher courts on judicial review has been to scrutinise carefully the decision below to ensure that it is in no way flawed. Judges deciding whether to grant permission to appeal should adopt no less stringent an approach.

26. A judge must not grant permission on a ground which does not feature in the grounds accompanying the application, unless the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success for the original appellant or for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international treaty obligations; or (possibly) if the ground relates to an issue of general importance, which the Upper Tribunal needs to address – see AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC).

27. Immigration appellants are frequently unrepresented and in those circumstances, it is necessary to read the decision appealed against with some care, but a judge must still in those circumstances follow the guidance given in AZ.

28. Where a point of law arises from a decision of the FtT other than an excluded decision there is a right of appeal, but the requirement to obtain permission enables the judiciary involved to grant permission only where it is appropriate. The purpose of this note is to give guidance when that will be so.

29. It is reasonable to expect a professional representative to set out the basis of the application for PTA with an appropriate degree of particularity and legibility. The parties are under a duty to assist the Tribunals in their overriding objective and to co-operate with them. For those reasons, a judge is entitled to expect that the grounds of appeal should set out in simple language, clearly and concisely why the decision of the First-tier Tribunal was wrong; that they address the relevant part of the decision and the way in which it is said to be wrong in respect of each way in which the decision is said to be wrong. A judge is entitled to point out where this has not been done; the judge's role is to evaluate the claimed errors, not to read through overlong grounds padded out with unnecessary quotations from statute or case law to discern if they disclose an arguable error.

30. Attention is drawn to the observations of McCombe LJ in VW (Sri Lanka) [2013] EWCA Civ 522 at [12]:

> Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact.

31. If a FtT judge considering an application for permission to appeal is in doubt whether there is an arguable error of law, the default position is that leave should be refused. The application can always be renewed.

Renewed applications

32. An application to the UT for permission to appeal is a fresh application and must include all the grounds on which the appellant seeks to rely, including those contained in the application to the FtT. It is sufficient to say that those grounds are relied upon. But if grounds set out in the first application are not included in the renewed application, a judge is entitled to assume that the appellant no longer wishes to rely on them. This should be recorded in the reasons for grant or refusal of permission.

33. An application to the UT is not an appeal against the decision of the Judge who considered the application to the FtT and should not be drafted in that way. It is sometimes helpful for applicants to say why they disagree with the reasons given by the FtT for refusing permission, but it is never obligatory.

34. In an application to the UT, an appellant may depart from or vary the grounds set out in the application to the FtT but the alleged error that is complained of must be in the original FtT decision.

What constitutes an error of law

35. Judges will be familiar with established guidance on what constitutes an error of law: see e.g. R (Iran) [2005] EWCA Civ 982 and will be aware of subject-specific applications: e.g. that it will normally be an error of law not to follow a starred or country guidance ('CG') case. It must always be recalled, however, that in dealing with applications for PTA Judges are concerned only with whether there is an arguable error of law, not whether the error is made out: see paragraph 4 above.

36. There are obvious limits to the circumstances when PTA should be

granted[4]:-

(i) A complaint with an assessment of facts that it was legitimate for the FtT Judge to make (even applying the reasonable degree of likelihood approach applicable to material aspects of protection claims) cannot normally be characterised as an error of law (but see E & R [2004] EWCA Civ 49).

(ii) Whilst disregard or misstatement of evidence that was placed before the FtT may amount to an error of law, or a failure to act fairly, the submission of further evidence following the hearing to contradict a finding (even if it would have been admissible in the original proceedings) cannot usually be said to be an error of law (see CA [2004] EWCA Civ 1165), unless the evidence is submitted to demonstrate unfairness or the decision is based on an entirely false factual hypothesis (see E & R [2004] EWCA Civ 49) or concerns questions of jurisdictional fact.

(iii) An error of law in the decision being challenged on a topic that is completely irrelevant to the substance of the decision in hand is unlikely to justify the grant of permission, unless the point itself is of some general importance in the context of immigration and asylum appeals and deserves further consideration on that basis alone. A grant of permission on this basis is more appropriately made by the UT (i.e. on a "renewed application").

(iv) A point of law that is not arguable whether because the statute is clear, the contention extravagant and unsustainable or there is stable, binding precedent of the higher courts, is unlikely to justify the grant of permission. However, if there is a case for the UT/higher courts to reconsider the point in issue, permission should be granted as a refusal of permission does not give rise to a right of appeal to the Court of Appeal. It will be rare for a judge to decide to grant PTA because he or she considers a binding precedent may be reviewed by a superior court with power to do so. But this may be appropriate in circumstances where, if the matter were before the UT, the latter could certify a point of law of public importance, so as to enable the Supreme Court to decide whether to grant permission to appeal, direct to that Court[5]. As with (iii) above, the UT, rather than the FtT, will be best placed to take a view on a matter of this kind.

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[4] See in this regard NH (India) [2007] EWCA Civ 1330: "appellate courts should not pick over AIT decisions in a microscopic search for error, and should be prepared to give immigration judges credit for knowing their job even if their written determinations are imperfectly expressed" (Sedley LJ at [28]).

[5] See ss 14A and B TCEA and KO (Nigeria) [2018] UKSC 53

Whilst the existence of reasonable prospects of success is a relevant criterion to apply to the grant of permission, it is not a precondition for its grant. A point of law may be of such general importance as to justify the grant of permission, even though the prospects of the appellant succeeding may not be substantial. Such cases will be rare and ordinarily would require the point to be identified clearly in the grounds. Caution should be exercised before putting the parties to the expense of contesting an appeal that would be bound or likely to fail on some independent ground. Regard should be had to the overriding objective in r.2 of the UT Rules 2008 ("to deal with cases justly and fairly") when considering such a course. In Anoliefo (permission to appeal) [2013] UKUT 00345 (IAC), at para 16, the President said that "Where there is no reasonable prospect that any error of law alleged in the grounds of appeal could have made a difference to the outcome, permission to appeal should not normally be granted in the absence of some point of public importance that it is otherwise in the public interest to determine."

37. On the other hand, where there is arguably an error of law in the decision, PTA should only be refused if it is a plain case that the error could have made no difference to the outcome. The facts must be capable of bringing the case home.

Allegations of unfairness

38. A bald allegation of bias or other procedural unfairness will not normally suffice to grant permission to appeal. As with all procedural issues, the proper place to raise an allegation of bias or unfairness is with the judge in question during the hearing. Any representative who concludes during a hearing that a judge is behaving in an inappropriate manner or that there has been procedural unfairness has a duty to raise this with the judge.

39. An allegation of bias against a judge is a serious matter. Any grounds alleging bias should address in detail the principles set out in Alubankudi (Appearance of bias) [2015] UKUT 542 and PA (protection claim: respondent's enquiries; bias) Bangladesh [2018] UKUT 337 (IAC).

40. Where further evidence is relied on to prove the procedural irregularity, the Judge will have to consider whether the nature of that evidence combined with any supporting material is sufficient or whether a further inquiry should be made.

41. If granted, the permission application should be referred to the Principal Resident Judge of the UTIAC, who may invite the FtJ concerned to comment, making clear that any response may be disclosed to both parties. Where no

or insufficient evidence has been provided with the grounds it may – although it is thought rarely - be appropriate to adjourn consideration of permission for such further evidence to be provided.

42. Allegations against former representatives will need to be supported by independent written evidence of a complaint to the representative in question, any response, and (if relevant) evidence of any complaint made to a regulatory body such as the Bar Council or the SRA. This may require the appellant to waive legal professional privilege so the former adviser can respond to the point.

The notice of decision

43. The operative section of the decision is that which states whether permission is granted or not. If permission is granted on limited grounds, this must be stated in this section; it is not sufficient to mention this in the reasons which follow. See paragraphs 49 and 50 below.

44. Where permission to appeal is being refused, it is desirable that the decision and the reasons for it should engage, however briefly, with those grounds. The maxim that an appellant is entitled to know why he or she has won or lost also has utility for PTA applications. There is a limit to what is required if grounds are overlong, rambling, incoherent and imprecise, but there should be some attempt to respond to the case as presented. What is called for is not a description of the grounds, but their evaluation.

45. Resort to very generalised or formulaic reasons or conclusions for refusing PTA do not give assurance that the point has been understood and considered.

46. If permission is granted, the reasons for doing so should be clearly identified in that part of the document in which the decision is recorded. If permission is granted on limited grounds, this must be clearly and unambiguously stated.

    If permission is granted on "all grounds" this should be stated and brief reasons for doing so given.

47. When drafting a grant of permission, it should be remembered that this is not a decision that there is an error of law in the decision of the FtT. That said, it is open to the UT to take a preliminary view that this is so and to give directions to that effect, and either that the appeal should be remitted to the FtT or allowed outright, without the need for a hearing.

Limited or restricted grounds

48. When deciding whether or not to grant permission to appeal, both the FtT and the UT may restrict the grant of permission to specified grounds - see FtT Rules, r.25(5) and UT Rules, r.22(4). That said, the right of the applicant to apply to the UT for permission to appeal on other grounds and its practical consequences lead to the pragmatic view that such a course is frequently more trouble than it is worth. A judicial observation on the merits of other grounds that have not caused permission to be granted may be of value to the judge seised of the appeal, who will be able to direct the parties to those grounds which are considered to have arguable merit.

49. If nevertheless it is decided permission should only be granted on limited or restricted grounds, the Judge must state this clearly and expressly in the in the section of the standard form that contains the decision. The judge must also set out reasons why permission has been refused on some grounds. It is only in very exceptional circumstances that the UT will be persuaded that a decision which, on its face, grants permission to appeal without express limitation is to be construed as anything other than a grant of permission on all of the grounds accompanying the application for permission, regardless of what might be said in the reasons for decision section of the document (see Safi and others (permission to appeal decisions) [2018] UKUT 388 (IAC)).

Requests to set aside or otherwise revisit a PTA

50. Sometimes, a UT judge who has granted or refused to grant PTA may receive a request to set aside or review that decision. There is only a limited power to do so. A PTA decision is an "excluded decision" and so the UT's powers to set aside its own decision are limited to those in rule 43 (set-aside), that is, only when the decision has been reached following a procedural irregularity. The power to set aside is exercisable only if the UT considers it is in the interests of justice and that one or more of the conditions in r.43(2) are satisfied. These conditions are limited to procedural irregularity. See Jan (Upper Tribunal: set-aside powers) [2016] UKUT 336 (IAC).

51. Clerical mistakes and accidental slips or omissions in a PTA decision can be corrected by the UT at any time under r.42 of the UT Rules but this cannot be used to reverse the outcome of a decision already communicated to the parties – see Katsonga v SSHD [2016] UKUT 228 (IAC).

52. The parties must bear in mind that, unless there is a direction to the contrary, it is the notice of appeal sent to the First-tier Tribunal which stands as the notice of appeal if the First-tier Tribunal granted permission - see UT Procedure Rules [23.1A]