Response from the Senior President of Tribunals to the consultation proposing to amend the Chamber Presidents' guidance regarding the use of non legal members in the First-tier and Upper Tribunal (Immigration and Asylum Chambers)

April 2014

Contents

Consultation

1. In November 2013 as the Senior President of Tribunals (SPT), I published a consultation seeking views on a proposal to amend the Chamber President's guidance regarding use of non-legal members (NLMs) in the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber), respectively.

2. By suggesting amendment to the current guidance, the proposal aimed to strike the balance between using judicial resources more flexibly; deploying NLMs where they were of most value in individual cases and ensuring the functions of the Tribunal are exercised effectively and efficiently. I am pleased to be able to publish the response to this consultation.

3. The consultation received 10 responses: seven from individuals and three from organisations (representing judges, non legal members and representatives) and I would like to thank all respondents for their views. A list of those who responded to the consultation is provided at Annex A.

4. The key issues raised in the consultation, and my response, are summarised in this document.

Background

5. The Senior President's power to determine the composition of a tribunal derives from The First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008. It states:

   Number of members of the First-tier Tribunal

   2.—(1) The number of members of the tribunal who are to decide any matter that falls to be decided by the First-tier Tribunal must be determined by the Senior President of Tribunals in accordance with paragraph (2).

   (2) The Senior President of Tribunals must have regard to—

   (a) where the matter which falls to be decided by the tribunal fell to a tribunal in a list in Schedule 6 to the Tribunals, Courts and Enforcement Act 2007 before its functions were transferred by order under section 30(1) of that Act, any provision made by or under any enactment for determining the number of members of that tribunal; and
   (b) the need for members of tribunals to have particular expertise, skills or knowledge.

   Number of members of the Upper Tribunal

   3.—(1) The number of members of the tribunal who are to decide any matter that falls to be decided by the Upper Tribunal is one unless determined otherwise under paragraph (2).

   (2) The tribunal may consist of two or three members if the Senior President of Tribunals so determines.

6. My decision on composition for each tribunal chamber is recorded in a composition statement. The Chamber President, under delegated powers, determines the composition of an individual tribunal within the framework of that statement.

7. The President of First-tier (Immigration and Asylum Chamber) wrote to the Resident Judges in August 2011 to advise on the allocation of NLMs, saying:

   "… NLMs should be used whenever possible in deportation appeals. There will be occasions when this is not possible, e.g. when a NLM cancels at short notice and it is not practicable to obtain a replacement or when the panel consists of 2 legal members."

8. However in later 2013, the Chamber Presidents and I decided to consider a change to the composition of the tribunals dealing with immigration and asylum matters, and wished to consult stakeholders on the proposed amendment before coming to a final decision. The proposal for consultation was as follows:

   (a) Though formally remaining members of the Upper Tribunal, NLMs' chief function will be to continue to sit mainly in the First-tier Tribunal, with only occasional sittings in the Upper Tribunal where the nature of the case makes a special direction for a NLM appropriate.

   (b) That the First-tier (Immigration and Asylum Chamber) Chamber President's direction is amended so that a First-tier panel will include a NLM only where the President of the Chamber or a Resident Judge has decided that there are strong public interest reasons for a NLM to sit as part of the Tribunal.

9. In the consultation I asked stakeholders whether they agreed with the proposals and the suggested implementation. The consultation ran from 11 November 2013 to 10 January 2014. The consultation pack contained the consultation questions, the current Chamber President's direction on the use of NLMs, together with the proposal paper.

10. The responses were analysed for comments on the proposed amendments; evidence of impact of the proposals; levels of support among particular groups and suitability for practical application. A full list of respondents is at Annex A.

11. From the judiciary, responses were received from the Council of Immigration Judges, four Tribunal Judges, one non-legal member of the First-tier Tribunal (Tax Chamber), the former Deputy Chief Adjudicator, and a former President of the Association of Members of the Immigration Appeal Tribunal (AMIAT), who is also a retired non-legal member.

12. Responses were also received on behalf of the members of AMIAT and the Immigration Law Practitioners Association (ILPA).

Summary of responses

Question 1

Do you agree with the Chamber President's proposals to implement changes to panel composition as outlined? If not, please give reasons.

Consultees' Responses

13. 8 out of the 10 respondents indicated that they did not agree with the proposals. This included both the Council of Immigration Judges and AMIAT.

14. 2 out of the 10 respondents indicated that they generally did agree with the proposals.

15. The respondent in full agreement with all aspects of the proposals, a First-tier Tribunal Judge, stated:

    "In this jurisdiction they [NLMs] add nothing to the process and hardly ever make any fresh observations in the hearing or on the draft judgements."

16. ILPA generally agreed with the proposals but urged caution on the use of 'public interest' as a criteria for sitting NLMs on a case, stating:

    "We do not consider that non-legal members have any advantage over legal members when it comes to weighing evidence. The reverse is the case. Like legal members, non-legal members have experience of ordinary life; unlike legal members they do not necessarily have any professional specialism in mastering complex matters of evidence."

    "…we do not agree that the basis for such a direction should be "strong public interest reasons". Instead we consider that a better alternative basis for such a direction would be that it is in the "interests of justice" for a non-legal member to be part of the panel."

17. On the latter, the reasoning explained by ILPA is that the Government's attempts to codify the public interest test in cases raising Article 8 grounds firstly via changes to the Immigration Rules and subsequently via the Immigration Bill (currently before Parliament) take a "particular and narrow" view of the public interest that does not, for example, include the recognition of the public interest in promoting the best interests of an appellant's child. They go on to say:

    "Again this developing legal background we do not consider that a non-legal member's acting as a sort of everyman or jury "voice of the public" is appropriate. There is a risk that the selective deployment of non-legal members to cases with a putative "strong public interest" would mean that in practice non-legal members will be allocated to, for example, only those deportation cases which involve the most serious crimes."

18. ILPA supported the proposal that NLMs only occasionally sit in the Upper Tribunal, saying:

    "We agree with the proposal to reduce the occasions on which non-legal members sit in the Upper Tribunal (Immigration and Asylum Chamber). It is not apparent what specific function they perform in a superior court of record concerned with appeals on a point of law from a first-instance tribunal."

19. However they noted the consultation paper lacked clarity on what basis a NLM might be asked to sit in the Upper Tribunal, and offered to comment on any specific proposals developing.

20. Of those that disagreed with the consultations proposals, the arguments can be broken down into several broad categories:

Public Confidence in the Justice System

21. Several respondents were of the view that the use of NLMs can improve public confidence that justice is being properly exercised, and also suggesting that appellants themselves might be more likely to readily accept the decision from their appeal if an NLM was involved in the deciding of it.

22. On behalf of the membership AMIAT, their President stated that:

"NLMs therefore provide a 'second head' with a wide and varied breadth of experience, contributing 'anxious scrutiny' to a decision that should be watertight and thus less likely to be appealed, and if so, unsuccessfully, which results in less expense and delay. Inevitably, this can only but reinforce public confidence in what is done - and, importantly, seen to be done."

Knowledge and Fact Finding

Most respondents were of the view that NLMs are of great use in helping judges in their fact finding, and are experts in the jurisdiction through experience.

23. A former Deputy Chief Adjudicator noted that:

"The Home Office all too frequently fail to find and then to look at all relevant facts in reaching a decision. To spot the gaps is difficult at the best of times and with the time constraints the judge has little chance of putting a badly flawed first HO decision – right –especially if sitting alone … The judge is indeed likely to become expert in the law but he or she cannot be regarded in the same light on fact as there is no later feedback by which to measure the right from the wrong assessment of the facts."

24. A First-tier Tribunal (Tax Chamber) NLM, supported that view, saying:

"Their experience of everyday life and interaction with various members of society makes them ideal for fact finding exercises … Judges are there to ensure that correct law is applied to facts as found. The assistance which NLMs can provide is to be valued very highly."

25. A First-tier Tribunal Judge's response stated that he believed that NLMs can provide particular value in helping balance a person's protected right against the public interest:

"NLMs are particularly helpful in decisions under Article 8 where they are well placed to come to a view regarding private and family life and the balancing exercise in the proportionality assessment and, in my experience, have been very clear sighted in their understand of the public interest."

26. However ILPA noted that

"From the perspective of an unrepresented appellant it may be the case that the long-serving non-legal member of the Tribunal neither sees the case through the

appellant's eyes, nor does he or she assist from the bench in bringing additional legal skills to the hearing and in so doing make good any deficit occasioned by the absence of competent legal representation caused by cuts to legal aid"

Cost

27. Respondents did not generally agree with the consultation's assertion that the current use of NLMs is placing "a disproportionate burden on the public purse". Several argued that there were alternative, more appropriate, areas in which the tribunal could seek to reduce costs. A former deputy Chief Adjudicator remarked that the costs of utilising NLMs must be weighed against:

    (a) the reduction in volume of further appeals
    (b) more acceptable image for the tribunal
    (c) if the HO could be persuaded not to appeal from any decision against it unless it involved an important issue of law (and permission be refused otherwise?)

28. The response on behalf of the members of AMIAT stated that – whilst recognising that the process by which NLMs are allocated and used could be much improved – its members believed NLMs:

    "… represent a relatively small cost to the public purse (not least because of the significantly lower sitting fee compared with their fee-paid legal colleagues), yet make a valuable contribution to effective and fair decision-making and its public perception. In this regard, foreign national criminals represent a considerable cost to the public in terms of detention, judicial process, public security and confidence.

    "We do not, therefore, agree that the current use and allocation of NLMs places a 'disproportionate burden' on the public purse. We believe that IAC NLMs represent excellent 'value for money', particularly in respect of visibly supporting effective justice to underpin public confidence."

29. Finally on costs, a First-tier Judge remarked:

    "Reading the consultation document one is left with the overall impression that the principle reason for the change is one of cost and the remaining comments are to attempt to justify that approach. I can only assume that the impetus for this proposed change comes from the administration."

Other Comments

30. The AMIAT response criticised the proposals as being in conflict with the spirit of the legislation providing the framework for panel composition when the former Asylum and Immigration Tribunal transferred into the unified tribunal structure in February 2010:

    "It is our considered view that, when Parliamentary approval was given to the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, it was not intended that it would be used in the manner that is now being proposed i.e. in a way that would have fundamental and very far reaching consequences for the future deployment and use of NLMs in the IAC."

31. AMIAT also raised concerns about the consistent application of any guidance that might be produced under the new proposals:

"If NLMs were listed for deportation appeals … clear listing criteria would be required to ensure consistency across the IAC … might be possible to codify in theory, it would be difficult to implement in practice."

32. The Council of Immigration Judges echoed those concerns:

"If the amendment to the FtTIAC Chamber President's Direction is made, we agree … that a listing protocol may be appropriate to ensure consistency in the use of NLMs across the jurisdiction and between hearing centres."

33. Finally, a former President of AMIAT urged consideration of the recruitment of more NLMs and widening the scope of their role:

"I therefore hope that the outcome of this particular Review of IAC NLMs will not yet again significantly undervalue the unique, quantifiable and perceptible role which IAC NLMs bring to the table, but instead have the wisdom and courage to recommend an increase in their number and bring about an appropriate enhancement to their wider role."

SPT's Response

34. Respondents are thanked for their comments. Both Chamber Presidents and I noted ILPA's remarks urging caution in sitting NLMs only on cases where public interest considerations were specifically raised through the legislation. I agree that a better formulation would be 'in the interests of justice'. For the reasons set out in paragraph 35, in most cases (whether a deportation case or not) a NLM will not add a particular dimension to the decision making but there will be some more complex appeals where a panel is needed for the interests of justice and, if not comprised of two judges, there may be a role for a NLM. It will be a matter of judicial discretion exercised by senior judges as to when it is appropriate to sit an NLM on the panel.

35. Public confidence in the appeals system relies on the tribunal making fair and swift decisions based on the facts of the case and the relevant law. Where there are non lawyers on the panel their presence should add a particular dimension to the decision making process. Judges receive regular training in immigration, human rights, diversity and refugee law, and are encouraged to keep up to date with legal developments both in the UK and internationally. There should be no suggestion that a judge sitting alone faces a deficiency of knowledge or ability in deciding an appeal. There may be particular cases where NLMs can help and support judges on fact-finding however the role of the tribunal is to determine the facts and to apply the law to them, the purpose of the NLM on the panel is not to make the judge's job less arduous.

36. I do not agree that NLMs offer value for money in all cases. I do not accept that in most cases the inclusion of a NLM more successfully protects a decision from a further appeal. Information is not readily available on permission applications by panel composition, but published statistics show that the success rate of First-tier Permission Applications in deportation appeals is comparable to that across all appeal types; both stand at 26% in the first half of the current financial year. I should also clarify that this consultation stems from joint discussions between HMCTS and Senior Tribunal Judiciary to introduce a greater flexibility and efficiency into tribunal panel composition, using NLMs where they add a particular dimension to the decision making process. Considering the 'interests of justice' will mean that NLMs will not sit on all deportation cases but equally it may mean that they are called to sit on other types of appeals depending on the nature of the appeal itself.

37. Any guidance about the discretion to deploy a NLM in deciding an appeal should leave that decision to those who are best placed to make it – senior judges in hearing centres who have the best understanding of individual appeals and the issues involved. The guidance should allow judges to make full use of NLMs where they are of the opinion that it is appropriate.

38. On the suggestion that the proposals represent a conflict with the spirit of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008, I do not agree. The Order requires that, as regards transferred-in tribunals like the Asylum and Immigration Tribunal, I must have regard to any provisions that pre-transfer used to determine the number of members of that tribunal, and the need for members of tribunals to have particular expertise, skills or knowledge. I am satisfied that I have had regard to both points throughout this consultation process, and that the proposals remain true to the spirit of the Order. My predecessor, now Lord Carnwath of Notting Hill, made it clear in his first implementation review in 2008 that he expected Chamber Presidents to review the current arrangements, in consultation with their judges, members and users: 'The general objective should be to ensure that the best use is made of judges and members, following the principles originally derived from the Leggatt review, and developed in the Consultation Paper Transforming Tribunals'.

39. In summary, the arguments brought forward do not persuade me that the automatic inclusion of NLMs on all panels deciding deportation (or other) appeals is appropriate or proportionate. I am not persuaded that their participation automatically leads to better quality decision making. The proposals in the original consultation did not seek to reduce the role of NLMs in immigration and asylum matters to an inconsequential level, or abolish them entirely. The proposals attempted to strike a better balance and provide more flexibility in deciding when NLMs can add a particular dimension to the decision making process. I believe that those best placed to make the decision as to whether to sit a NLM on a panel are judges in hearing centres dealing with the actual appeals themselves.

Question 2

Do you consider that these proposals will have any impact on equality and diversity issues? If so, please explain.

Consultees' Responses

40. 4 of the 10 respondents commented on potential equality and diversity impacts.

41. 2 of the 10 respondents stated they believed there would be no impact.

42. 4 of the 10 respondents made no comment on equality and diversity.

43. On the face of it, no critical equality and diversity issues were raised by respondents, with the key remarks being as follows.

44. AMIAT:

"…, some NLMs have a 'protected characteristic' under The Equality Act, thus bringing to the jurisdiction first-hand knowledge and understanding in regard to appellants who may have suffered - or still be suffering - from an actual or potential life-threatening health issue and which is submitted to be of relevance to their particular case."

"Geographic diversity is crucial in regard to the important NLM function of representing the public interest … IAC judges - both full-time and fee-paid - live near to their hearing centres and, arguably, are not therefore best able to appreciate to the full the differences in public opinion between the urban and the rural, and indeed between the different regions of the UK.

45. ILPA:

"As per the evidence of the then chair of ILPA to the parliamentary Committee taking evidence on the bill that became the Immigration and Asylum Act 1999, in 1999 it was considered that abolishing lay membership might have a deleterious effect on the ethnic diversity of the Tribunal. We consider that it would be sensible to consider whether this remains true and also to consider the question as it relates to other protected characteristics, including disability and age. The position may have changed since 1999, but if so, this should be identified. In any event, the answer to any want of ethnic diversity on the Tribunal or want of diversity as regards any other protected characteristic is to appoint more legal members with these characteristics."

46. An Upper Tribunal Judge :

"When proposals were made for the setting up of the forebear of the present immigration appeals system in the 1969 White Paper, the perception of those likely to be recruited as adjudicators was that they would be seen as overwhelmingly white and male, not to mention middle-aged. This is of course no longer the case with first-tier judges, many of whom are now female, from various ethnic minorities, and younger than in the past. To that extent the changes proposed would not have the same negative impact on equality and diversity issues as in the past.."

47. A NLM:

"It is best to ensure that the pool of NLMs available reflects the cross section of all the communities in United Kingdom. This way there is not likely to be any adverse affect on provision of Justice."

SPT's Response

48. I recognise that having a range of NLMs to call on – geographically, and by protected characteristic – is a benefit to the tribunal. It is equally true of judges. The JAC appoint both judges and members and have statutory responsibilities in respect to diversity. However I am not persuaded by any of the comments provided that the proposals represent a contravention of the Equalities Act 2010, nor would they disadvantage members or users of the tribunal, or impact on access to justice.

Question 3

Any other comments were invited.

Consultees' Responses

49. Several other comments were made by respondents, which are summarised below.

<u>Terms and Conditions</u>

50. AMIAT, supported by the Council of Immigration Judges, suggested that if the current arrangements for the allocation of NLMs are maintained:

"We would, however, support the introduction of an upper sitting limit for NLMs, in line with our fee-paid legal colleagues, as this would also have the effect of helping to ensure a more equitable distribution of appropriate work across the IAC NLM resource."

Use in UTIAC

51. Several responses advocated an increase in participation in the Upper Tribunal. AMIAT's remarked that:

"In 2012, we understood that serious consideration was being given to using NLMs further in the Upper Tribunal, not only for Country Guidance cases, but also in the re-making of deportation decisions. But we heard nothing further."

52. An increase in the utilisation of NLMs in the Upper Tribunal was suggested by two former Upper Tribunal Judges, one made the argument that if the Upper Tribunal is expected to remake a decision wherever possible, it would be helpful for the UT panel to have a NLM sitting with them if an NLM would have sat on the case in the First-tier Tribunal.

"I agree that non-legal members still have an important part to play in Upper Tribunal hearings. While … the initial decision, as to whether there is a material error of law in the first-tier decision which requires that to be re-made, is one for the judges of the Upper Tribunal, the re-making of the decision itself is mainly a matter of fact, and no different in that from the first-tier hearing."

"Consequently, my suggestion, so far as the Upper Tribunal is concerned, is that non-legal members should remain available on a routine basis for hearings involving the re-making of decisions on deportation appeals."

Technical

53. A First-tier Judge posited that the consultation paper's was not entirely correct in suggesting that the Borders Act had removed or reduced the public interest test from a great many appeals. This view was supported by the Council of Immigration Judges who agreed it was an oversimplification of the current statutory position. The Council's response reads:

"It is certainly the case that we now deal with many "automatic" deportation cases under the UK Borders Act 2007 ("the 2007 Act"). In these cases, where an appellant may seek to argue that removal in pursuance of the deportation order would breach his or her Convention rights (having the same meaning here as under the Human Rights Act 1998), the public interest will still be a salient feature in the proportionality assessment that will almost always be required. It may be an oversimplification to state, at paragraphs 17 and 26 of the consultation paper, that the number of cases where the public interest test remains a factor has significantly reduced"

Unrepresented Appellants

54. ILPA's response noted that:

"A question not addressed in the consultation paper is whether non-legal members bring anything particular to proceedings where the appellant is unrepresented."

General

55. A NLM of the Tax Chamber, suggested that:

> *"There is no reason why some of the simple cases can not be tried by NLMs only. This is subject to NLMs having been suitably trained in the craft of Chairmanship."*

SPT's Response

56. At present the Chamber President does not feel it is necessary to introduce an upper sitting limit for NLMs. The tribunal already forecasts and monitors the use of NLMs, both as a body of members and individually. He will continue to keep sitting levels under review generally and more specifically at the 6 and 12 month points after the new guidance is introduced.

57. I note the concern raised about the assessment of the public interest in a deportation case. This response is not the place for detailed consideration of the test, however, the Chamber President of the Upper Tribunal (Immigration and Asylum Chamber) has provided this helpful summary:

> *"In asylum and immigration cases, the issue of what constitutes the public interest is a question of law. This, typically, requires identification and correct appreciation of binding decisions, for example those of the Court of Appeal and Supreme Court, coupled with an understanding of the doctrine of precedent. Furthermore, increasingly, the public interest is formulated by Parliament in either primary legislation – for example section 32 of the UK Borders Act 2007 – or the Immigration Rules, or both. In these cases, the task of the Tribunal is that of construing and applying the legislation and, further, correctly appreciating the inter-relationship between primary legislation and subordinate legislation. The Tribunal must also be alert to the significant curtailment of its margin of appreciation. This is particularly so in those cases where Parliament has spelt out in some detail both the constituent elements of the public interest and the manner in which the Tribunal is to conduct any proportionality assessment. It is incumbent on the Tribunal to find the relevant facts. Having done so, the exercise thereafter involves matters of law, which have an increasingly complex nature."*

58. Judges of both Immigration and Asylum Chambers have many years of experience in dealing with unrepresented or otherwise vulnerable appellants, and receive extensive training and guidance in doing so. I do not support a view that sitting NLMs on a panel with a Judge where the appellant is unrepresented will necessarily make an appellant more comfortable in the hearing room, and nor will it necessarily bring greater comprehension to the appellant or add quality to the decision making process. It may of course be appropriate for a NLM to sit on a panel where an appellant is unrepresented, but that will depend on the nature and issues of the case, not whether a representative is in attendance.

59. I take note of the suggestion that simple cases might be heard by NLMs alone. Although it is the case in the First-tier tax chamber that NLMs decide some cases alone this is a narrow category of penalty appeals which turn on whether there was reasonable justification for late submission of a tax return, there are no legal issues in question. I can see no parallel within the Immigration and Asylum sphere.

Conclusions

60. Respondents are once again thanked for their comments. I note the opposition of both AMIAT and CIJ to the proposal. I am not persuaded by arguments that the proposals

would be detrimental to tribunal users, to the functions of the tribunal itself, or to its decision making. However ILPA expressed a need for caution in determining which cases might benefit from the participation of a NLM which I accept. I propose therefore to agree to amendment of the proposal to allow senior immigration and asylum judges to decide on a case by case basis whether a NLM should be included on the panel in the interests of justice. In the future I will, with the chamber presidents, consider how the new arrangements are working in practice.

61. The proposals will allow a more targeted, efficient and flexible use of tribunal resources in terms of panel composition, allowing judges with sight of the issues involved in the actual appeals to determine in each instance whether or not it is appropriate to deploy a NLM on a panel with a judge.

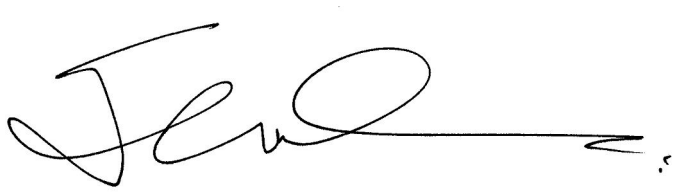
62. I do not believe that the proposals carry with them serious equality or diversity issues, nor do I believe that they represent a conflict with the spirit of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008.

Next Steps

63. In the light of the consultation responses I am therefore amending the proposal as follows:

> *Though formally remaining members of the Upper Tribunal, NLMs' chief function will be to continue to sit mainly in the First-tier Tribunal, with only occasional sittings in the Upper Tribunal where the nature of the case makes a special direction for a NLM appropriate.*
>
> *That the Chamber Presidents' guidance is amended so that a First-tier panel will include a NLM only where the President of the Chamber or a Resident Judge has decided that it would be in the interests of justice for a NLM to sit as part of the Tribunal.*

64. Chamber Presidents in both the First-tier and Upper Tribunal will issue new instructions regarding the use of NLMs in each chamber. These changes will be implemented as soon as practicable.



Sir Jeremy Sullivan

Senior President of Tribunals

April 2014

Annex A – List of respondents

Respondent	Capacity
Laurence Saffer	First-tier Judge
Mohammed Farooq	Non Legal member of the First-tier Tribunal (Tax Chamber)
Geoffrey Care	Former Deputy Chief Adjudicator
Richard McKee	Upper Tribunal Judge (now retired)
Michel Olszewski JP	Michel Olszewski JP - President (on behalf of the 47 Non-legal members, active and retired) of the Association of Members of the Immigration and Asylum Tribunals (AMIAT)
Michael Taylor CBE DL	Former AMIAT President Former SIAC non legal member
John Pullig	First-tier Judge
John Freeman	Upper Tribunal Judge
Council of Immigration Judges	Membership association of judges in the Immigration and Asylum Chambers of both the First-tier and Upper Tribunals
Immigration Law Practitioners Association	Professional membership association of qualified immigration advisers