TRIBUNALS
JUDICIARY

UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

GUIDANCE NOTE 2011 No 1: Permission to appeal to UTIAC (amended September 2013 & July 2014)

This guidance note is issued under paragraph 7 of Schedule 4 to the Tribunals, Courts and Enforcement Act 2007.

1. Attached to this note is the guidance issued to judges considering whether to grant permission to appeal from a decision of the First-tier Tribunal IAC to the Upper Tribunal. This note is designed to inform interested parties appearing before UTIAC of the terms of the guidance.

2. The consideration of an application for permission to appeal is a judicial decision for the individual judge performing it. The guidance issued to the judiciary does not modify or replace the legal obligations of a judge considering such a matter and it is not considered that they are required to take this guidance into account when making decisions.

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

4. The guidance may be modified or withdrawn in the light of developing experience.

The Hon Mr Justice Blake
President

July 2011 (amended September 2013 and July 2014)

PERMISSION TO APPEAL GUIDANCE NOTE[1]

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[1] Prepared by the President with assistance from Judges of the UTIAC

DRAFT GUIDANCE NOTE ON PERMISSIONS TO APPEAL (PTA)

Introduction

1. This guidance note is drafted to assist those considering applications for permission to appeal (PTAs) to the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC), and to address commonly occurring problems[2]. It is not a source of law nor does it aspire to be an authoritative statement of law, but is intended to promote consistent and high standards in making such decisions. The guidance covers both applications for PTA to the UT made to the FtT ("first applications") and applications for PTA made to the UT ("second applications"). Some parts of this guidance will only be relevant to one or other of these functions.

The statutory regime

2. Section 11(2) of the Tribunals, Courts and Enforcement Act 2007 (TCEA) grants any party to a case a right of appeal with permission (or Northern Ireland leave) to appeal granted either by the First tier Tribunal (FtT) or the Upper Tribunal (UT) on an application made by that party. The new two-tier system replaced the single-tier Asylum and Immigration Tribunal (AIT) from 15 February 2010. The procedure rules for the FtT are the Asylum and Immigration Tribunal (Procedure) Rules 2005 as amended ('the FtT Rules') - they continue to have force notwithstanding the abolition of the AIT. The procedure rules for the UT are the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the UT Rules').

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

Excluded decisions

4. 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 275, but para 2 of this order relating to immigration has been replaced by the Tribunals, Courts and Enforcement Act 2007 (Miscellaneous Provisions) Order 2010 SI 41. The latter excludes:

a. Asylum support appeals under s.103 Immigration and Asylum Act 1999.
b. Decisions made in connection with bail applications under Schedule 2 Immigration 1971.
c. Any procedural, ancillary or preliminary decision made in relation to appeals under ss.82-83A Nationality Immigration and Asylum Act 2002, regulation 26 of the Immigration (EEA) Regulations 2006 or s.40A British Nationality Act 1981.

[2] This guidance does not deal with PTA applications in fast-track cases or cases subject to imminent removal under FtT Rules, r.11/ Urgent Cases Business (UCB). Nor does it address, except briefly, case management aspects.

5. A decision not to accept a notice of appeal for absence of jurisdiction under r. 9 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.10(6)). The position would appear to be different if the FtT proceeds to entertain the appeal and the Secretary of State has not taken the jurisdiction point.[3]

6. On the face of it, 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 to do so.

7. The purpose of this guidance note is to investigate a little further what those circumstances may be.

Appropriate to grant /refuse permission

8. Appeals come to the FtT in a variety of circumstances, some in relation to comparatively ordinary questions such as family settlement visas, and others dealing with claims to international protection in the UK under the Refugee Convention, the European Convention on Human Rights and humanitarian protection under the EU Qualification Directive. 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 anxiously 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 (in the context of "second applications", a refusal of permission is final and so the application may be the last opportunity for a judicial remedy). Other important types of case concern claimed rights under the EU Treaties and the secondary legislation, and deportation appeals.

9. 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, but lack of skill or pressure of time may lead to a clear point not being identified. Where there may be a duty to consider points that are "Robinson obvious" (see R v Secretary of State for the Home Department, ex p Robinson [1997] 3 WLR 1162) there is power to consider any other point arising from the decision if the interests of justice so require.

10. Immigration appellants are frequently unrepresented, and in those circumstances it is necessary to read the decision appealed against with some

[3] See Anwar and Adjo [2010] EWCA Civ 1275, [19]-[23].

care to ensure that an error of law is not revealed in the decision making, even if it is not one identified in the appellant's own grounds.

11. When making a "second application" an appellant or a professional representative may vary the grounds from those set out in the "first application" for PTA. The only limit in the statute is that the error must be in the original FtT decision: the appeal is not against the decision of the Judge who considered the "first application" for PTA. Restrictions on what could be considered arising from the previous regime of statutory reconsideration do not apply to the scheme of the Upper Tribunal. It is therefore important for an appellant/professional representative to make clear in the grounds of application to the Upper Tribunal under UT rule 21, whether the grounds submitted to the FtT are being relied on in the "second application" made direct to the Upper Tribunal and, if so, to what extent. In cases where it is uncertain whether the applicant has abandoned some or all grounds raised in the "first application" for PTA, it will normally be appropriate to address both sets of grounds. **But, in such cases,** how much note is taken of the grounds raised in the "first application" will depend on their quality and on the extent to which the Judge refusing to grant permission has dealt properly with them.

12. 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[4]. 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 below para 37.

13. There are obvious limits to the circumstances when PTA should be granted[5]:-

> (a) 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 a matter of law (but see E & R [2004] EWCA Civ 49).
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> (b) 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

[4] See Practice Direction 12.

[5] 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]).

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.

(c) An error of law 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. It is considered that a grant of permission on this basis is more appropriately made by the UT (i.e. on a "second application").

(d) 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 High Court, the terms of s.12 of the Administration of Justice Act 1969 were engaged and the question of permission to appeal could be leap-frogged to the Supreme Court[6]. As with (c) above, the UT, rather than the FtT, will be best placed to take a view on a matter of this kind.

(e) Grounds alleging that the FtT erred in failing to adjourn will need to be considered in the context of FtT Rules, r.21(2) and (3) and the overriding objective in rule 4.

14. 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

[6] See e.g. Jones v Kaney [2010] EWHC 61 (QB) [37]-[47].

the overriding objective in r.2 of the UT Rules 2008 ("to deal with cases justly and fairly") when considering such a course.

15. Immigration decisions may be based on failures to comply with more than one requirement of the relevant rules or regulations. An unarguable failure to comply with one requirement may determine the fate of the appeal, but a judicial decision on another aspect may be of importance and the UT may wish to use the opportunity of the application to review the existing jurisprudence on the topic, to address frequently arising problems or give guidance in a reported case on a novel or important issue.

16. On the other hand, PTA should only be refused on the basis that the error was immaterial, 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. 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." Disputes about materiality are best left to the appeal process itself rather than summarily determined by refusal of permission.

Procedural aspects of the grant of permission

17. The initial task of the judge considering a "first application" for PTA is different in kind from that of the judge considering a "second application" for PTA. Before considering whether to grant a "first application" the former: (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. 60)); 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 and FtT Rules, r. 25. Such a review can only be undertaken if the Judge is satisfied that there was an error of law in the decision: see FtT Rules, r.26(1); see further below para 33.

18. The UT Rules permit an application for permission to appeal even if the Judge dealing with the "first application" has not admitted the decision (because of a refusal to extend time) see FtT Rules r.24(4) and UT Rules, r.21(7), but in this case should only do so where it considers that it is the interests of justice to do so (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). As a matter of practicality it is generally more sensible for the Judge considering permission to consider the merits of the application, rather than base a refusal on lack of timeliness alone, especially

when there is only a marginal excess of the strict time limits in the Rules.

Out of time issues in more detail

20. For Judges dealing with "first applications" for PTA the rule[7] is that they must be received no later than 5 days (28 days, if outside the UK) after the date on which the party making the application is deemed to have been served with written reasons for the decision. If it is deemed to have been received later than the time required, time may be extended only if the Tribunal is "satisfied that by reason of special circumstances it would be unjust not to do so" (FtT Rules, r.24). It is important to remember that under FtT Rules r.55(5) it is possible for the "deeming" provision to be displaced by evidence of actual service. If the date of actual service is later than the deemed date, this may mean that the application is not in fact out of time. It is for the appellant to explain the real or apparent delay. However, where an application has been posted in time with some expectation of timeous delivery but has in fact been received out of time, Judges are entitled of their own motion to take account of the vagaries of postal delivery in finding good reason where appropriate.

21. In a case of a "second application" in which the "first application" for PTA was not admitted because it was not in time, that application must include the reason why the "first application" was late and the UT can only admit it (thereby reversing the decision made on the "first application" not to admit it) if it considers that "it is in the interests of justice for it to do so" (UT Rules, r.21(7)).

22. For Judges dealing with "second applications" the rule[8] is that they must be received by the UT no later than 7 working days (if out of country, 56 days) after the date on which notice of the refusal of the "first application" was sent to the appellant (UT Rules, r.21(3)(ab)). A late application must include a request for an extension of time (UT Rules, r.21(6)(a)). In deciding whether to admit a late "second application" for PTA, the Judge's discretion is at large subject to ensuring it complies with the overriding objective to deal with cases fairly and justly under UT Rules, r.2. Although for the purpose of the UT Rules (and FtT Rules) time ends at 5pm on the last day in question, fax transmissions received after that time or letters dated before then that may have been delayed in the post can be the beneficiaries of an extension without any explanation being presented. The greater the non compliance with the time provisions, the greater the need for explanation particularly where the other party has been prejudiced by the delay (Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC) at para 20). Unless the UT decides to extend time under r. 5.3(a) it must not admit the application: UT Rules, r.21(b).

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[7] Different rules apply in fast-track cases.

[8] Different rules apply in fast-track cases.

23. In asylum appeals the FtT has to send the notice of its decision on the application for permission to appeal to the respondent for promulgation: FtT Rules, r.27. When the Home Office post or deliver the determination to the appellant their computer communicates with the Tribunal. The administrative staff enter the date by which the appellant's appeal should reach us. The staff also enter a manuscript advice to us if the appeal appears to be out of time.

24. However, the dates need treating with great caution as the Home Office often do not in fact post the letter on the date given to our administrative staff. In addition, whereas it might be thought by admin staff that an application is out of time, there may have been a miscalculation. The Judge may need to calculate the days to assess the position. Sometimes the appellant includes a copy of the determination with a Home Office stamp on it and that date *may* be reliable. Where the appellant asserts that he or she received the determination on a particular date it may be expedient to give the appellant the benefit of the doubt, particularly where this is supported by a date received stamp from a legal representative. It can happen that an application to the FtT is made late and the question of an extension of time has not been dealt with at the time of granting permission. In these circumstances, the grant of permission to appeal is to be treated as being 'conditional' (see Boktor and Wanis (late application for permission) Egypt [2011] UKUT 00442 (IAC), as explained in Samir (FtT Permission to appeal: time) [2013] UKUT 00003 (IAC)). In considering the matter the UT Judge will be sitting as a FtT Judge. It is suggested that by parity of reasoning with Boktor and Wanis where an UT Judge has not dealt with the issue of lateness, the grant of permission can be considered as being conditional with the issue of an extension of time to be considered by the UT Judge seized of the appeal.

Limited or restricted grounds

25. Whilst both the FtT when dealing with a "first application" for PTA (FtT Rules, r.25(5)) and the UT when dealing with a "second application" for PTA (UT Rules, r.22(4)) may restrict the grant of permission to specified grounds, 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 suggestion 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. If nevertheless it is decided permission should only be granted or limited or restricted grounds, the Judge should state this expressly (and precisely), so that it is clear that he or she contemplates the possibility of the applicant applying to the UT in respect of the other grounds.

Oral hearings of "second applications"

26. The rules governing applications for permission assume that the decision

will be considered on the papers but there is discretion to adjourn the case for oral hearing. In cases where the delay exceeds 28 days, it may be appropriate for the respondent to be given an opportunity to make representations on the grant of permission (see para 21 of Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC)). Given the time constraints on management of applications, the present suggestion to Judges considering "second applications" who are minded to adjourn for an oral hearing is to grant permission subject to the points on which they would have sought further clarification. Again such cases can be the subject of active case management if it appears from submissions from the opposing party that permission was granted on a false basis or the Judge's concerns can be fully met.

Allegations of unfairness

27. A bald allegation of bias or other procedural unfairness will not normally suffice to grant permission to appeal. 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. 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. Judges should be aware that, at present, hearings in the IAC at both levels are not always tape recorded; frequently hearings are conducted in the absence of a clerk or a Home Office Presenting Officer so the opportunities for independent support for the proposition may sometimes be very limited. 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.

28. Allegations against former representatives will need to be supported by independent evidence and may require waiver of legal professional privilege so the former adviser can respond to the point.

The grounds of appeal

29. Where permission to appeal is being refused on competently drafted grounds, 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[9] also has utility for PTA applications. There is a limit to what is required if grounds are overlengthy, rambling, incoherent and imprecise, but there should be some attempt to respond to the case as presented. What is called for is not description of the grounds, but evaluation.

30. If the grounds are the same as those made to the Judge dealing with the

[9] See e.g. Schiemann LJ in R v Brent Borough Council, ex p Baruwa (1997) 29 HLR 929.

"first application" for PTA this can often be done by adopting that Judge's observations, but where the grounds are different or the submission is that the Judge dealing with the "first application" has failed to engage with the reasons for which permission is sought, something further is necessary; see above para 11.

31. Resort to very generalised or formulaic reasons or conclusions for refusing PTA do not give assurance that the point has been understood and engaged with[10]. In an 11 February 2010 speech to the UTIAC judiciary the President highlighted the need when dealing with PTAs to respond to the grounds of appeal and to identify succinctly and clearly why PTA has been granted or refused.

Requests to set aside or otherwise revisit a PTA

32. Sometimes, a UT judge who has granted or refused to grant PTA may receive a request to set aside or review that decision.

33. As noted earlier at para 17, the Judge considering a "first application" for PTA will, before deciding whether to grant permission to appeal, decide (1) whether there is any basis for exercising powers to set aside the FtT decision (FtT Rules, r. 60)); and (2) whether to review the FtT decision[11] (see s.9(1) TCEA and FtT Rules, rr. 25 and 26). The following are the main points of difference: .

a. The discretion to amend the FtT decision in r.60(1) of the FtT Rules is intended to enable the FtT to correct a clerical error or other accidental slip or omission. For example, the FtT Judge dismissed an appeal when it is clear from his/her reasoning that he/she intended to allow it.

b. The discretion to set aside the FtT decision in r.60(1A) of the FtT Rules is intended to enable the FtT to set aside a decision (after any appropriate consultation, as provided for in r.60(1A)), on the ground that the decision was wrongly made as a result of administrative error on the part of the Tribunal or its staff. For example, the notice of hearing was sent to the wrong address or, alternatively, if the FtT received a written explanation for the absence of the appellant from the hearing but this did not reach the Judge who proceeded in the appellant's absence. An

[10] E.g. it is settled law that a FtT judge should give reasons which are "proper, adequate and intelligible…" (Schiemann LJ ,op.cit.). But if those same words are the only reason given by a Judge refusing an application for PTA, it might be argued that this shows the Judge has not addressed the grounds except formulaically (although see TM (Zimbabwe] [2010] EWCA Civ 916, [68], [75]).

[11] Such a review can only be undertaken if the Judge is satisfied that there was an error of law in the decision: see FtT Rules, r.26(1).

application under r.60(1A) to set aside because of administrative error must be made within the time limit specified in r.60(1B).

c. The discretion to review a decision under s.9(1) TCEA and rr. 25 and 26 of the FtT rules is only available if the Judge is satisfied that there *was* an error of law in the decision. The discretion to review a decision under s.9(1) is exercisable only on the FtT's own initiative (see s. 9(1)(b) TCEA).

34. An application to review made under UT Rules, r.46 is misconceived. That rule operates only in the context of an application to the UT for permission to appeal a decision of the UT to the "relevant appellate court"; i.e. the Court of Appeal/Court of Session/Court of Appeal in NI. Decisions on PTAs cannot be reviewed by the UT or appealed to those Courts, since they are "excluded decisions" (TCEA, s.10(1), 13(8)(c)).

35. A decision on a "second application" may however be set aside under r.43 and re-made, because it is a "decision which disposes of proceedings". There are special time limits in r.43(4) for a party making a set aside application in an asylum case or an immigration case. 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.

36. 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.

Permission granted

37. Where permission is granted, the reasons for doing so should be clearly identified. Save in the plainest case the Judge will only be determining that an error of law is *arguable* rather than it is made out: see para 12 above.

Remittal to the FtT

38. Section 12 of the TCEA 2007 makes provision for the UT's options, having decided that the FtT made an error on a point of law, to include remittal of the case to the FtT with directions for its reconsideration. However, since in general the task at the permission stage is only to decide whether there is an arguable error of law, consideration of whether to remit (having decided to set aside) will usually only arise, if at all, at a later stage. But when it does arise, the UT consideration must be governed by Practice Statement 7 of the Senior President's Practice Statements of 10 February 2010 (as amended).