PRESIDENT OF THE
QUEEN'S BENCH DIVISION

RESPONSE OF THE PRESIDENT OF THE QUEEN'S BENCH DIVISION TO THE UK BORDER AGENCY CONSULTATION ON IMMIGRATION APPEALS

1. This is a response to the Government's Consultation Paper of 21 August 2008 on immigration appeals. It is made by the President of the Queen's Bench Division.

2. The proposals in the Consultation Paper are strongly supported. The judges of the Administrative Court, the court most directly affected, were invited to provide an input into this response. The only reaction received from them has been one of warm endorsement of the proposals. There has been no opposition to the proposals.

3. It is agreed that the new tribunal structure created by the Tribunals, Courts and Enforcement Act 2007 provides a more appropriate and effective means of handling immigration appeals than the present system.

4. It is also agreed that a change of the kind proposed is needed in order to relieve the pressure on the higher courts. In particular, immigration work (reconsideration applications and judicial review applications) is placing a heavy and disproportionate burden on the Administrative Court, over-stretching its resources and giving rise to unacceptable delays across the whole range of the court's work. The Lord Chief Justice drew attention to this serious problem in paragraphs 5.70-5.72 of his *Review of the Administration of Justice in the Courts*, presented to Parliament in March 2008. There has been no let-up in the volume of immigration work, which continues to account for almost three-quarters of the cases lodged in the court. Despite strenuous efforts to deal with the problem, including extremely heavy listing of cases, the redeployment of High Court

Judges from other areas of work (which has added to the pressures elsewhere) and the appointment of additional Deputy High Court Judges, the pressure on the court remains intense.

5. Reconsideration applications, running at about 4,000 a year in the Administrative Court, are an important part of the problem. In practice, the "filter" operated by Senior Immigration Judges in the Asylum and Immigration Tribunal has proved very effective and only a small proportion of the reconsideration applications that are pursued to the court have any substantive merit or justify a determination by a High Court Judge. But they take up a lot of judicial time, and the system involves a disproportionate use of the limited resources of the court. The proposed new arrangements, under which reconsideration applications will be replaced by applications for permission to appeal to the Upper Tribunal, offer a sensible alternative. The judges of the Upper Tribunal, who will include Senior Immigration Judges with a High Court Judge presiding over the chamber and the possibility of other High Court Judges sitting as necessary, will be suitably qualified to determine such applications.

6. Much of the benefit of removing reconsideration applications from the Administrative Court would be lost if decisions of the Upper Tribunal refusing permission to appeal were subject on a routine basis to applications for judicial review. The points made on this at paragraphs 23-24 of the Consultation Paper, including the possibility of legislation, are noted. It would be wrong to anticipate the approach of the courts to such applications. This area of uncertainty does not, however, detract from the overall good sense of the proposals and should not be allowed to jeopardise their implementation.

7. The Consultation Paper contemplates at paragraphs 31-33 that, where permission to appeal to the Upper Tribunal has been granted, the case will generally be dealt with substantively in the Upper Tribunal rather than being remitted for a further determination by the First-tier Tribunal. The power to decide whether to deal with a case substantively or to remit it to the First-tier should lie with the Upper Tribunal, which will have to take into account the availability of judicial resources at both levels as well as the particular features of the individual case. But there

are undoubted advantages in the Upper Tribunal determining an appeal substantively wherever possible: it should result in higher quality decisions and achieve finality more quickly.

8. Placing immigration appeals within the new tribunal structure should also alleviate the pressure on the Court of Appeal, as suggested at paragraph 31 of the Consultation Paper. Applications for permission to appeal, and substantive appeals, from the Asylum and Immigration Tribunal account for a substantial and growing proportion of the work of that court. One of the problems of the present system is that where reconsideration is ordered the only avenue of challenge to the decision reached on reconsideration is by way of appeal to the Court of Appeal, and the court has to deal in consequence with a large number of decisions of ordinary Immigration Judges that raise no point of importance. If the proposals are implemented, the general provisions of the 2007 Act governing appeals to the Court of Appeal will apply. An appeal will lie only on a point of law, and with permission, from a decision of the Upper Tribunal on a substantive appeal. Decisions of the Upper Tribunal will have been taken by senior judges and are likely to be of a generally high quality, which should in itself reduce both the number of applications to the court and the number of successful appeals. It will also be open to the Lord Chancellor, under section 13(6) of the 2007 Act, to apply "second appeal" criteria to the grant of permission, so as to require that the appeal would raise some important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear the appeal.

9. Paragraphs 34-46 of the Consultation Paper raise an issue about the making of procedure rules if immigration appeals are placed in the new tribunal structure as proposed. Such rules should be the responsibility of the Tribunal Procedure Rules Committee. There is no sufficient justification for applying a separate rule-making system to immigration appeals.

10. The Consultation Paper raises a separate issue about the judicial review jurisdiction of the Upper Tribunal and proposes that the existing statutory bar on the transfer of immigration judicial review cases from the Administrative Court to the Upper Tribunal be lifted. That proposal, too, is welcomed. The number of

immigration judicial review cases lodged in the court is over 4,000 a year and exceeds even the number of reconsideration applications. Some of them are plainly suited to the Administrative Court and should remain there, but a substantial number could be dealt with appropriately in the Upper Tribunal once that Tribunal had acquired an immigration expertise through the transfer of immigration appeals into the tribunal structure and the appointment of Senior Immigration Judges as judges of the Upper Tribunal. The 2007 Act confers on the judiciary the power to transfer non-immigration judicial review cases to the Upper Tribunal. The same power should exist for immigration cases. It would provide a further means of relieving the pressure on the Administrative Court and speeding up the work of that court. The proposed statutory amendment is therefore viewed as an important measure and it is hoped that its implementation will not be delayed.

11. As to the timescale for implementation of the proposals as a whole, the contents of paragraphs 41-42 of the Consultation Paper are noted. It is plainly in the interests of everyone involved in the administrative justice system that the changes are made as soon as possible. This tells strongly in favour of implementing the bulk of the proposals without waiting for the additional statutory changes referred to. If a June 2009 date can be achieved, it would be an immense relief. Any slippage from that date should be kept to the minimum necessary.