

The 'Administrative Appeals Chamber' of the Upper Tribunal

This important new tribunal, with judicial review jurisdiction, really deserves a far fuller article than this. However, this note should I hope give the basic information on the Administrative Appeals Chamber which comes into existence in Scotland on 3 November. I would particularly welcome corrections, additions, updatings, or further links on this item: comments at <http://www.jonathanmitchell.info/2008/10/30/the-new-administrative-appeals-chamber-in-scotland/> please.

The Tribunals, Courts, and Enforcement Act 2007 established on the face of the Act two new tribunals, a 'First-tier Tribunal' and an 'Upper Tribunal', with a UK-wide jurisdiction. The First-tier Tribunal is not my immediate concern; it has three 'chambers' which take over the functions of a wide range of existing tribunals and other bodies¹. The Upper Tribunal has only one 'chamber'; the 'Administrative Appeals Chamber'. This has two broad functions; to hear appeals from the First-tier Tribunal and to decide judicial reviews transferred to it from the Court of Session, or the English or Northern Irish High Courts. With effect from 3 November, the Court of Session has, under section 20 of the 2007 Act, the power² to transfer any application to the supervisory jurisdiction to the Administrative Appeals Chamber if three conditions are met:

* **First:** that 'the application does not seek anything other than an exercise of the supervisory jurisdiction of the Court of Session';

* **Second:** that 'the subject matter of the application is not a devolved Scottish matter'³; and

* **Third:** that, in effect, it is not to do with immigration or nationality⁴.

The website of the new Tribunal is at

¹ First-tier Tribunal and Upper Tribunal (Chambers) Order 2008, SI 2008/2684.

² Only a power, not a duty, because there is no Act of Sederunt under section 20 (3).

³ Defined by section 20 (7)

⁴ See <http://www.jonathanmitchell.info/2008/10/29/proposal-to-remove-judicial-review-from-scottish-court/> for the UKBA's consultation on removing this condition.

<http://www.tribunals.gov.uk/rulesLegislation.htm#fttut> . Yes, that's pretty much all there is there right now.

There's nothing on the Scottish Courts Service website; presumably applications to transfer are simply ordinary motions.

The Upper Tribunal Rules 2008 are SI 2008/2698. Some important points, so far as Scottish judicial review proceedings in the Tribunal are concerned, are these:

- * Section 6 of the 2007 Act: any Upper Tribunal member (and that includes *ex officio* all English district and county court judges as well as all full time sheriffs) can hear a Scottish judicial review. Section 18, which provides that judicial reviews may only be heard by High Court/Court of Session judges or those ticketed as equivalents, applies only to English and Northern Irish cases. Why is there no Scottish equivalent? Ask the Advocate General.

- * Rule 11: Rights of audience and litigation are not restricted to lawyers. A party can appoint anyone as a representative.

- * Rules 2 and 3: An English-style "overriding objectives" provision; time and effort given to be 'proportionate'; an obligation on parties and representatives to 'help'; and an ADR provision.

- * Rules 5, 6, 7, 15, and 27 in particular: The tribunal can do what it wants, and can do so *ex proprio motu*; it can transfer back to the Court of Session (or indeed to the English or Northern Irish High Court).

- * Rule 10: There is no general right to expenses. Expenses may only be awarded 'if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.' Taxation is by the Auditor of the Court of Session, on the Court of Session scale.

- * Section 29 of the 2007 Act: There is however provision for orders for expenses to be made against legal representatives, mirroring the English 'wasted costs' jurisdiction.

- * Rule 18: This contemplates that legal aid (or ABWOR?) might be granted in the Upper Tribunal in Scottish proceedings. But there is no provision, so far as I can see, for either so far as Scottish legal aid legislation is concerned. When the 2007 Act was under consideration in the House of Commons, it was pointed out by English MPs that it would be wrong if legal aid was not

available for judicial review in the Tribunal on the same basis as in the English High Court, and the Minister gave undertakings⁵. But nobody noticed Scotland. It's only the UK Parliament, after all. I don't suppose anyone told SLAB either, did they?

* Rule 34: There is no right to a hearing. But the Tribunal ' *must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter*'.

* Rules 44 to 46: Complex provisions as to further appeal, for which apparently the Tribunal's leave is required. Presumably any appeal will be to the Inner House under Chapter 41 of the Rules of Court.

Training: The Senior President of the Tribunal writes "*Each tribunal office-holder transferring into the new chambers will receive a letter within the next couple of weeks setting out to which office and chamber their current judicial office will move (if you hold more than one judicial office you will receive a letter for each). All judiciary and legal officers transferring into the new structures will receive jurisdiction-specific training and training leads will be in touch to confirm. Arrangements have also been made for the training of staff.*"

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⁵ <http://www.theyworkforyou.com/debate/?id=2007-06-27c.380.1>