

SEMINAR PROGRAMME

Introduction to the immigration and asylum legal system and basic principles of public law

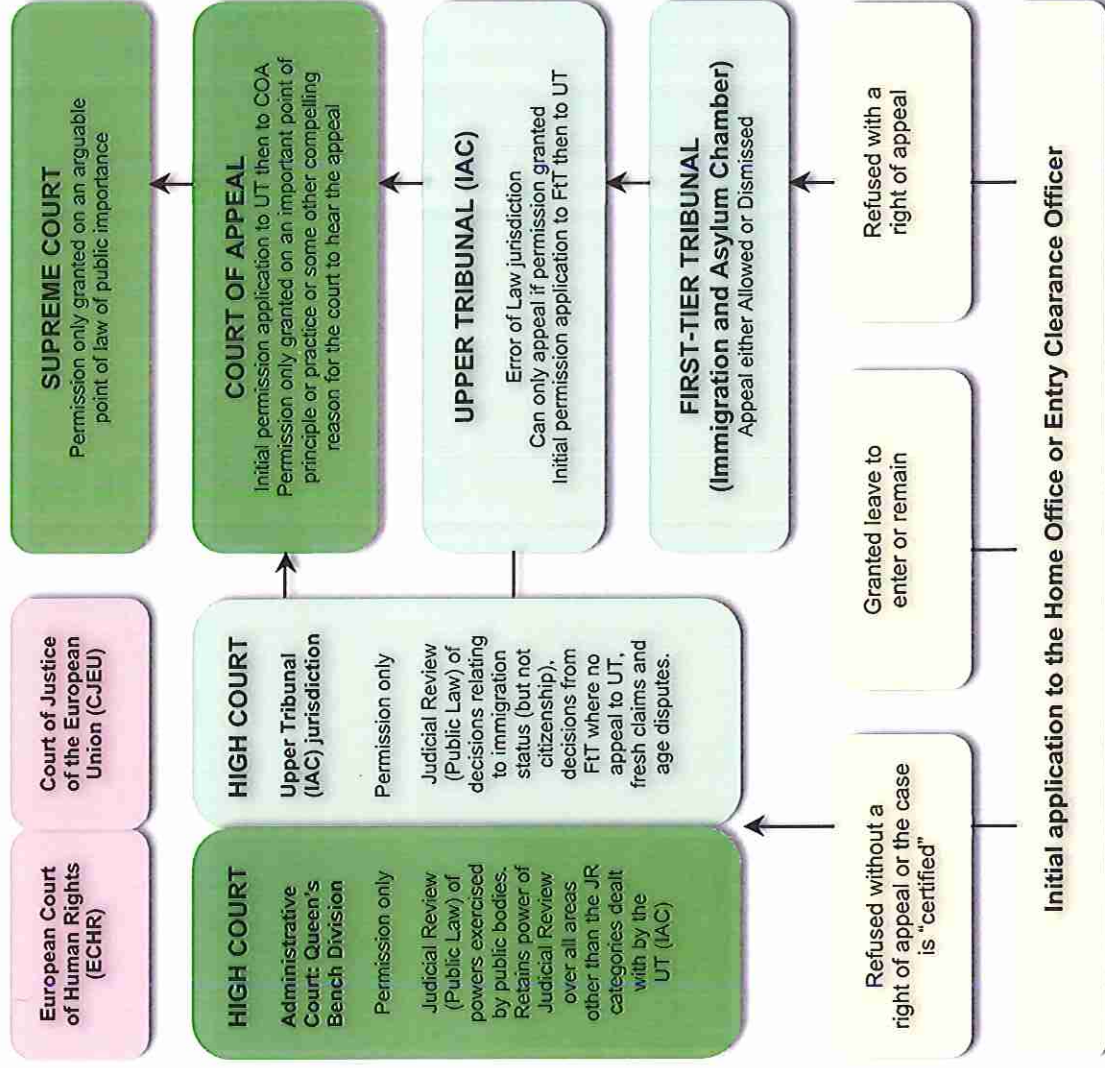
Welcome and introductions

1.10pm – 1.30pm	Overview of the structure of the court and tribunal system
1.30pm – 2.00pm	Appealable and non-appealable decisions
2.00pm – 2.30pm	Alternative remedies to court action
2.30pm – 2.45pm	Break
2.45pm – 3.30pm	Basic principles of public law and judicial review
3.30pm – 3.50pm	Case Studies
3.50pm – 4.00pm	General discussion, summary and close.

The Migrants' Law Project

Factsheet: The immigration legal system

- Some decisions made by public bodies are given a statutory right of appeal, which normally includes consideration of the facts of the case within the context of the relevant legal framework.
- Other decisions have a restricted right of appeal where the applicant can only appeal on certain limited grounds.
- Many other decisions have no right of appeal but might still be subject to review under public law principles if it is arguable that the decision was unlawful.
- The law is regulated by a system of courts and tribunals at progressively senior levels. The higher the court the more persuasive, or binding, the judgment is on decision-makers. Permission to appeal is required in all but the First-tier Tribunal (IAC).
- Sources of law include:
 - Primary legislation
 - Secondary legislation
 - Common law (court judgments)
 - European law
 - International law
 - Rules of practice and policy



Appealable and non-appealable decisions

Appeals to a tribunal are generally quicker and cheaper than judicial review claims: the procedure is less formal and tribunals are more used to dealing with litigants in person.

However, in many circumstances there is no right of appeal, and judicial review is likely to be the only remedy.

Sometimes it may be possible to bring a judicial review claim even where there is a right of appeal, but normally the High Court expects claimants to have exhausted alternative remedies, such as appeals, before resorting to the High Court.

Appeals to the First-tier Tribunal

Immigration and Asylum Chamber

This Chamber deals with appeals against immigration decisions. An 'immigration decision' is defined by s. 82(2) of the Nationality, Immigration and Asylum Act 2002. Broadly, these are:

- A refusal of leave to enter the UK
- The refusal of entry clearance (a visa granted prior to arrival in the UK)
- A variation of or refusal to vary a person's leave to remain, if the result is that the person has no leave to remain
- Revocation of indefinite leave
- A decision to remove a person who is an illegal entrant or overstayer or person who has been refused further leave to remain
- A decision to make a deportation order or a decision that a person is subject to automatic deportation
- Refusal to revoke a deportation order
- Refusal to grant a certificate of entitlement to the right of abode, or a decision to withdraw the right of abode

In addition, the Act provides for a right of appeal against the refusal of asylum for people granted leave to remain for twelve months or more. This would apply, for example, to unaccompanied children granted discretionary leave to remain until they are 17.5 years old, but refused asylum.

Regulation 26 of the Immigration (European Economic Area) Regulations gives a right of appeal against an 'EEA decision' – these are decisions made under the EEA Regulations and include, for example:

- Refusal of entry on EEA grounds
- Refusal to grant an EEA Residence permit
- Refusal of a family permit
- Decision to deport an EEA national

Sometimes the right of appeal is restricted, in which case the only grounds on which the appeal can be brought are race relations, human rights and Refugee Convention grounds. This applies to some refusals of entry clearance, leave to enter or variations/refusals to vary leave to remain.

Some appeals can only be brought after the appellant has left, or been removed from, the UK. If the appellant has made an asylum or human rights claim, the right of appeal is always prior to removal, unless the claim is certified as 'clearly unfounded'.

Social Entitlement Chamber

A decision to refuse or to withdraw asylum support under either s4 or s95 of the Immigration and Asylum Act 1999 is appealable to the Social Entitlement Chamber (Asylum Support).

Upper Tribunal

Immigration and Asylum Chamber

A decision by the First-tier Tribunal (IAC) to dismiss or allow an appeal can be appealed to the Upper Tribunal (IAC) on a point of law. Permission to appeal is needed, either from the First-tier Tribunal or the Upper Tribunal. The Upper Tribunal will decide whether to set aside the FTT's decision and if it does, will normally remake the decision for itself; it may sometimes remit the appeal to the FTT.

Non-appealable decisions

The following decisions cannot be appealed, and so any challenge lies by way of judicial review. This is not an exhaustive list, but gives some of the most commonly encountered examples:

- Refusal to treat further representations as a 'fresh claim for asylum'
- Decision that an asylum claim is 'clearly unfounded' so that the right of appeal exists only after removal
- Decision to allocate an asylum claim to the 'detained fast track' – although the Tribunal has power to order that a case be transferred out of the 'fast track' once an appeal is lodged
- Decision to detain – although a bail application can be considered by the FTT(IAC) – the refusal of bail is also not appealable
- Decision to certify under s96 of the 2002 Act. This provision allows the SSHD to prevent an appeal being brought against a decision on an application which could and should have been raised in an earlier appeal or application.
- The setting of removal directions to a particular country/on a particular date or time – as distinct from a decision that a person is to be removed at all.
- A decision to disperse an asylum seeker being provided asylum support
- Refusal to grant support based on s. 55 of the 2002 Act i.e. on the basis that the person did not claim asylum as soon as reasonably practicable after arrival in the UK

In addition, some decisions made by the Tribunals cannot be appealed:

- Decision by the First-Tier Tribunal (Asylum Support) on an appeal against the refusal to grant or decision to discontinue asylum support
- Procedural, preliminary or ancillary decisions made by the FTT(IAC) – such as a decision under rule 9 of its procedure rules that it has no jurisdiction, or a refusal to extend time for appealing
- Refusal of permission to appeal by the Upper Tribunal – but note that following the case of *Cart*, there is an enhanced test before an application for judicial review of the Upper Tribunal will be considered.

A basic guide to public law principles: immigration and asylum focus

What is public law?

Public law is a set of legal principles which govern the manner in which public authorities exercise their power.

Public authorities

Government departments (e.g. the UK Border Agency, local authorities, police and prisons) are all public bodies. Some organisations, whilst not government departments can still be public bodies if their function is to provide or discharge a public function (e.g. a private company running an Immigration Detention Centre).

Where a public body such as the Home Office or UK Border Agency makes a decision that affects an individual, if that decision is made on a wrong understanding of the law or facts or is made through a process that is unfair or biased; then the person affected by that decision can take action to challenge that decision in a variety of ways. Examples of how s/he can do so are:

- 1 By appealing against that decision (if there is a right of appeal); or
- 2 By pursuing a complaint; or
- 3 By making a claim for judicial review.

Public law also regulates the conduct of Tribunals and lower Courts (ie Courts below the High Court) such as the First Tier Tribunal (Immigration and Asylum Chamber), (Social Entitlement Chamber) – Asylum Support; and the Upper Tribunal (Immigration and Asylum).

What is the source of public bodies' authority to make decisions?

The main sources of the power to make decisions are:

- 1 Acts of Parliament (primary legislation)
- 2 Delegated (or secondary) legislation i.e. legislation that Ministers have the power to make because an Act of Parliament gives that authority. Such legislation can be in the

form of directions, orders or regulations (e.g. the Asylum Support Regulations or the Tribunal Procedure Rules);

- 3 European Union Law – this can be in the form of directives or regulations made by legislative bodies of the European Union.

The basis on which a public body can act will be either because:

- 1 it has the power to act – that something may be done in certain circumstances (e.g. detain a person); or
- 2 it is under a duty to either do something (e.g. provide support for someone who has claimed asylum and is destitute) or to not do something.

Most, if not all, public bodies will also have **policies** to regulate how they exercise their powers and duties. The purpose of policies is to help to make sure that a public body acts consistently as between one person and another and that it exercises its discretion in a principled and reasonable way rather than in an arbitrary manner. Generally, a public body must act in accordance with its policies or have good reasons for departing from its policies. However, it must not operate an inflexible policy.

The Enforcement Instructions Guidance, the Immigration Directorate's Instructions are all examples of policies. The UK Border Agency website has a long section on its website setting out its policies: https://www.gov.uk/government/publications?keywords=&publication_filter_option=guidance&topics%5B%5D=all&departments%5B%5D=uk-visas-and-immigration&official_document_status=all&world_locations%5B%5D=all&from_date=&to_date=&commit=Refresh+results

The **Immigration Rules** are a unique hybrid of policy and law. They are not strictly speaking legislation, and the Secretary of State can change them at will (although they must be laid before Parliament which can disapprove them). However, the UKBA is bound to comply with the Immigration Rules in so far as they apply to a case before it, and the Tribunal will allow an appeal against a decision that is not in accordance with the Immigration Rules.

Making a lawful decision

In order to make a lawful decision, a public authority has to:

- Act within its powers;
- Be reasonable;
- Be fair;
- Make decision within a reasonable period of time.

Acting within its powers

A public body must have the power to make the decision that it makes otherwise it will be acting unlawfully. For example, everyone has a right to access the court. Last year a High Court judge said that the UK Border Agency's policy to give little or no notice of removal to some classes of people was unlawful because it did not give those people a reasonable chance to challenge that decision in Court. Therefore the Home Secretary was acting outside her powers in having such a policy.

Acting in a reasonable manner

A public body must properly understand the law and apply it correctly in a particular case. It should consider each case on its own merit and must not adopt inflexible blanket policies – see for example the decision of the Supreme Court in *Lumba and Mighty* that the blanket policy of detention of foreign nationals liable to deportation adopted in the wake of the 'foreign national prisoners crisis' was unlawful because it admitted of no exceptions.

A public body also has to take into account all the relevant information and ignore irrelevant information.

Acting fairly

A public body must allow the person to put his or her case fully – e.g. by allowing them a reasonable time to produce documents. If the public body has information that is relevant to its decision, it should disclose it to the person concerned and give him/her the opportunity to explain or deal with it before a decision is made especially if the material could lead to an unfavourable decision for the person.

A public body must give full and proper reasons for its decision so that the person affected can know the basis on which the decision has been taken.

Where a decision is going to impact on an organisation then as part of the process of taking a fair decision, the public body may well have a duty to consult with the organisation concerned. If so, it has to provide a reasonable period of time for consultation and take into account the result of that consultation when making its decision.

The extent of these duties to act fairly may depend on the importance of the issue. The Courts have consistently held that asylum applications involve decisions of the highest importance and that only the highest standards of fairness will suffice.

Making decisions in a reasonable time

What is a reasonable time will vary according to the issue and other relevant factors. We will discuss this in more detail when thinking about the case studies.

The Human Rights Act

The Human Rights Act 1998 came into effect on 2 October 2000, requires public authorities to act in a way that is compatible with the European Convention on Human Rights (ECHR) as far as is possible for them to do so.

A failure to act in this way creates an independent possibility of challenge with the possibility to argue that the decision of the public body is unlawful because it is in breach of one of the rights guaranteed in the ECHR – e.g. the right to family life or the right not to be tortured or subjected to treatment that is inhuman and degrading or a right to liberty.

It is also possible to challenge secondary or even primary legislation on the basis that it is not compatible with one of the ECHR rights. However, a court cannot 'strike down' primary legislation – it can only make a declaration that it is incompatible with the ECHR rights, leaving it to Parliament to decide how to remedy the incompatibility. An example of this is the *Baiai* case which decided that the certificate of approval for marriage scheme was incompatible with the ECHR right to marry read together with the prohibition of discrimination.

European law

There are two branches of European law that are relevant to the decisions of public bodies:

- 1 European Union law: This is enforceable directly in the domestic courts, which can make a 'reference' to the Court of Justice of the European Union¹ in Luxembourg if the law is unclear.

This law in the area of immigration and asylum cases takes precedence over English law. Examples are the rights of European workers and now it also has impact on refugee law related issues; and

- 2 The European Convention on Human Rights which is enforceable in the European Court of Human Rights in Strasbourg.

Maladministration

Maladministration occurs when a public body acts in a way that it ought not to have done and it has occurred as a result of: bias, neglect, delay, incompetence, ineptitude, turpitude, arbitrariness. Many of the principles set out in respect of public law overlap or are closely related to maladministration.

Delay in taking action (e.g. issuing status documents or making a decision), losing documents, making misleading and inaccurate statements are all examples of maladministration.

Timing

Public law claims have to be started in court very quickly. This means that if you think an individual needs advice on public law issues they need to be urgently referred to a lawyer.

¹ This used to be known as the European Court of Justice (ECJ) and is still commonly referred to as the ECJ.

What action can you take under public law?

If a public authority acts in breach of public law principles in making a decision then the decision is unlawful.

The unlawful decision can be challenged in a number of ways:

- 1 Through an appeal if there is a right of appeal; or
- 2 Making a complaint using an internal complaints procedure and if that doesn't resolve the issue then by considering a complaint to the appropriate Ombudsman; or
- 3 Through court action by using the mechanism of judicial review. This will entail instructing a lawyer and bringing the case using public law principles.

The nature of the unlawful act and its consequences will determine which avenue of challenge is the most appropriate.

The Migrants' Law Project

Factsheet: Basic principles of public law

- The Home Office and entry clearance posts make many different types of decisions relating to the immigration status of migrants as well as those relating to the general administration of the immigration system. Only some of those decisions have a right of appeal to the First-tier Tribunal.

- An **appealable decision** is one that has been given an identifiable right of appeal contained in a statute. At first instance the appeal is likely to be a full review of the decision where the Tribunal considers the facts of the case and makes a fresh decision.

- A **non-appealable decision** is one where there is no right of appeal contained in a statute or an appeal is specifically excluded by statute e.g. certification. A non-appealable decision might be a decision relating to a person's status in the UK but could also be one of many other administrative decisions made by a public body e.g. detention.

- Where there is no right of appeal the High Court (or the Upper Tribunal exercising **Judicial Review** jurisdiction) may be able to review whether the decision is lawful but the court will not normally decide the facts or remake the decision i.e. not a decision on the merits of a case.

- A claimant will normally be expected to have exhausted all other possible remedies before applying for Judicial Review. Claim must be brought "promptly" or in any event not later than three months after the claim arises.

GROUNDS FOR JUDICIAL REVIEW

Illegality

A public body must act within the law and within the powers prescribed to it

Irrationality

A public body must act rationally and reasonably

Procedural impropriety

A public body must act in accordance with minimum standards of procedural fairness. Maladministration may occur due to bias, neglect, delay, incompetence or due to arbitrary actions or decisions

Legitimate expectation

A discreet ground for JR based on expectation that a particular decision or course of action should have been taken

Human Rights Act 1998

A public body must not act in a way that is incompatible with human rights

JUDICIAL REVIEW REMEDIES

Quashing Order

Invalidates the original decision

Prohibiting Order

Prevents a specific action

Mandatory Order

Compels a specific action

Declaration

Sets out the position or the obligations of the parties

Injunction

Order to stop a specific action
Often issued as an interim order

Damages

Only in limited circumstances

Complaints as a way of challenging wrongdoing by a public authority

Wrongdoing by a public authority may often justify court action, either because there is a right of appeal to a Tribunal or if there is no right of appeal, the issue at stake is such that the most appropriate forum for challenge is a court.

However, there are types of wrongdoing where court involvement is not appropriate and in these cases making a formal complaint may be the right approach.

All public bodies have complaints procedures to enable service users to make complaints. Issues that may be suitable for complaints range from rude or impolite behaviour on the part of a member of staff at the relevant public authority or delays in taking decisions.

Information required to make a complaint

The information the Home Office website states is needed in order to make the complaint is set out here:

<https://www.gov.uk/government/organisations/home-office/about/complaints-procedure#how-to-make-a-complaint>

The general requirements are to provide information on:

- The area of the Home Office to which your complaint refers and a contact name (if you have one);
- Whether it is an original complaint or a follow-up to an earlier response;
- A clear description of the complaint and what you would like the Home Office to do to sort things out;
- Your contact details.

Factors to bear in mind when making a formal complaint

1. Think about what documents or other information you need to make a full complaint and to avoid any errors.
2. Make the complaint as soon as possible in writing, once you have all the information you need.
3. Set out the facts clearly. In addition to setting out the problem, in detail, it would also be sensible to include details such as the individual's Home Office reference, name of the person/department responsible for the problem and any other information that will help an investigation.
4. If possible, include copies of any letters/emails or other documents which may be relevant.

5. Think about the tone of your complaint: make sure that the language used is temperate and reasonable however frustrated and cross the complainant may be.
6. Be clear what action the complainant feels need to be taken.
7. Request compensation if there has been loss (it is best to state in the letter if the wrongdoing has led to any distress, financial loss etc. so that the possibility of any financial compensation is highlighted at the earliest opportunity).
8. Keep copies of everything that is sent and copies of all correspondence you receive.
9. Send items by recorded or guaranteed delivery or fax so that there is proof of posting.

Possible ways to complain

Complaints about immigration and asylum issues

The complaint letter should be sent to:

- Complaints Allocation Hub, Central Point of Receipt, 11th Floor, Lunar House, 40 Wellesley Road, Croydon CR9 2BY
- Email: complaints@homeoffice.gsi.gov.uk

The process

Receipt of the complaint should be quickly acknowledged and a full response provided within 20 working days. If the complaint concerns serious professional misconduct it may take up to 12 weeks for an investigation to be completed.

You should be kept up to date with the timescale of the investigation. If you think there has been delay or you have not been kept up to date then send letters explaining your concerns.

Possible outcomes of a successful complaint

The Home Office states that successful complaints can lead to changes in procedure and additional staff training or sometimes disciplinary action.

The Home Office may pay compensation if the individual can show financial loss. This can include refunding costs that have been incurred as a result of their error and exceptionally, making a 'consolatory payment.'

If you are unhappy with the outcome of the complaint

The Home Office's response should include details of what to do if you believe the complaint has not been dealt with properly. They recommend that if you are unsatisfied you should request that the complaint is reviewed by a more senior member of Home Office staff.

Final option: The Ombudsman

If you remain unsatisfied with the outcome of your complaint, you can also ask a member of Parliament to refer the case to the Parliamentary and Health Service Ombudsman. The PHSO has its own website: <http://www.ombudsman.org.uk/>

Parliament has given a number of Ombudsmen the power to investigate complaints about maladministration. The two Ombudsmen relevant in the field of asylum and immigration law are: the Parliamentary and Health Service Ombudsman and the Prisons and Probation Ombudsman.

The Ombudsman can provide help and information about the process but will not consider the complaint unless it is referred to them by an MP. In order to have an MP refer the complaint you need to complete a simple but lengthy form.

One issue to be aware of, is that you must ensure that an MP is aware of the problem and your request that it is referred to the Ombudsman within 1 year of the problem arising. The Ombudsman can look into complaints made outside this timeframe if there is a good reason for the delay. But it is sensible to make the referral to the MP in time if at all possible.

The Ombudsman can conduct an independent investigation and has the power to require the Home Office to apologise, give a more detailed explanation of their actions and to pay compensation.

Chief Inspector of Borders and Immigration

This avenue of complaint is not directly helpful for individuals as the Chief Inspector of Borders and Immigration remit is not to consider individual cases. The Inspector reports annually to the Home Secretary and his reports are placed before Parliament

In general the Chief Inspector is appointed to assess the efficiency and effectiveness of the UK's border and immigration functions. Main areas of his interest which may be relevant to individuals are:

- Home Office overall performance;
- Practice and procedure in making decisions;
- The treatment of claimants and applicants;
- Discrimination in the exercise of functions;
- Enforcement powers;
- The handling of complaints.

Whilst he does not have the remit to consider/ investigate individual cases, he is allowed to take note of the key issues in such cases and use these to inform his wider inspection programme. If you have a complaint you are very worried about that falls within the above list of issues or a series of complaints raising the same issue then it may be worth sending copies of the complaint and the outcome to the Chief Inspector.

Assaults and complaints about the Home Office's use of 'police powers'

If a complaint is made about the conduct of Border Force officer then this should be addressed to:

By letter: Border Force Complaints and Correspondence Team, Lunar House, 11th floor Long Corridor, 40 Wellesley Road, Croydon CR9 2BY

Email: complaints&compliments@homeoffice.gsi.gov.uk

Timing

One key issue to be aware of is that the complaint must be made within 3 months of the incident. There is a possibility that the complaint may be investigated if it is made outside this timescale but only if the individual can show 'exceptional circumstances.'

If it is a very serious complaint related to officers' use of police-like powers in England and Wales, eg a serious assault, the Home Office should refer this to the Independent Police Complaints Commission (IPCC) for separate investigation.

If the complaint involves this type of very serious issue it would be sensible to try to refer the individual to a solicitor.