

EXPLANATORY MEMORANDUM TO
THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) (IMMIGRATION AND
ASYLUM CHAMBER) (AMENDMENT) RULES 2024

2024 No. 588

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty

2. Declaration

- 2.1 Lord Chancellor and Secretary of State for Justice, Rt Hon Alex Chalk KC MP, can confirm that this Explanatory Memorandum meets the required standard.
- 2.2 Gemma Hewison, Director for Illegal Migration, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

3. Contact

- 3.1 Jack Keating at the Ministry of Justice, email: Jack.Keating@justice.gov.uk or Daniel Crofton-Green: Daniel.Crofton-Green@justice.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

- 4.1 This instrument makes procedural rules to establish a new procedure through which people may appeal to the Immigration and Asylum Chamber of the Upper Tribunal against the Secretary of State for the Home Office's ("Secretary of State") decision to remove them from the United Kingdom ("UK") under the provisions of the Illegal Migration Act 2023 ("the Act").

Where does the legislation extend to, and apply?

- 4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.
- 4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom

5. Policy Context

What is being done and why?

- 5.1 In 2022, over 45,700 illegal entrants entered the UK having crossed the English Channel in small boats; this compares to some 28,500 in 2021 and 8,500 in 2020. In 2022, many of the illegal entrants originated from safe countries, such as Albania (28% of the total), and all travel through safe countries, such as France or other safe European countries. The annual cost of the asylum system is the highest in over two decades at over £3 billion, with £6 million a day spent housing migrants in over 300

hotels. Methods of irregular entry can also be dangerous and leave migrants open to exploitation by organised crime groups.

- 5.2 Building on the provisions in the Nationality and Borders Act (NABA) 2022, and the measures set out in the New Plan for Immigration, the purpose of the Act is to dissuade migrants from using criminal smugglers to facilitate dangerous and illegal journeys to the UK from safe country. To achieve this, the Act creates a system in which anyone arriving illegally in the UK will not have their asylum claim, human rights claim, or modern slavery referral considered while they are in the UK. Instead, the Home Secretary will be under a duty to remove them to either to their home country or to a safe third country safe third country, to which they can apply for asylum and, if granted, would remain.
- 5.3 The only way in which illegal entrants subject to the duty will be able to stay in the UK, on a temporary basis, is if they can provide credible and compelling evidence that they a) face a real, imminent, and foreseeable risk of serious and irreversible harm in the specific third country to which they are due to be removed; or b) do not meet the required conditions for removal. These are referred to as “suspensive claims” and are considered, in the first instance, by the Secretary of State.

What was the previous policy, how is this different?

- 5.4 Existing procedure within the Immigration and Asylum Chamber of the Upper Tribunal is governed by the Tribunal Procedure (Upper Tribunal) Rules 2008 (“the 2008 Rules”).
- 5.5 The Tribunal Procedure (Upper Tribunal) (Immigration and Asylum Chamber) (Amendment) Rules 2024 (“the Rules”) are being made to establish the procedure by which parties may appeal to the Upper Tribunal against the Secretary of State’s decision to refuse their suspensive claim.
- 5.6 In instances where the Secretary of State has refused a suspensive claim and has not certified the claim as clearly unfounded, an individual may appeal directly to the Upper Tribunal. Where the Secretary of State has refused a suspensive claim and certified the claim as clearly unfounded, there is no automatic right of appeal against the refusal of the claim, instead an individual may apply to the Upper Tribunal for permission to appeal this decision. If the Secretary of State has refused a suspensive claim on the grounds that it has been brought out of time of the original claim period without compelling reasons, an individual may apply for a declaration from the Upper Tribunal that there were compelling reasons why they failed to make the suspensive claim within the claim period.
- 5.7 In accordance with the provisions of the Act, the Rules set out the detailed procedure to be followed for permissions to appeal, appeals, and declarations. This procedure includes defined timeframes for these proceedings and the instances in which these timeframes might be extended by the Upper Tribunal, as well as the practice for applicants or appellants wishing to raise new matters in relation to their suspensive claim that have not previously been considered by the Secretary of State. These new Rules provide a much quicker end to end process than the current tribunal rules for immigration appeals - with the aim of expediting removal where it is established that there is no legal right to remain.

6. Legislative and Legal Context

How has the law changed?

- 6.1 Part 1 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”) created a two-tier tribunal system into which existing tribunals can be transferred or new appeal rights directed. Section 3 of the 2007 Act establishes the First-tier Tribunal and the Upper Tribunal, which together make up this two-tier system. Both Tribunals are divided into Chambers which deal with different areas of jurisdiction e.g., health, immigration and asylum and education. In addition to statutory appeals, the Upper Tribunal also deals with certain kinds of judicial reviews.

Why was this approach taken to change the law?

- 6.2 The 2007 Act provides for tribunal procedure rules, which govern the practice and procedure to be followed in both Tribunals, to be made by the Tribunal Procedure Committee. In a departure from usual practice, required for reasons of expediency, Section 50 of the Act conferred powers upon the Lord Chancellor to make the first set of procedural rules required to implement the provisions relating to the new appeals process established in Sections 44 – 49 of the Act. The Lord Chancellor’s power will be spent once it is exercised for the first time. The Tribunal Procedure Committee retains the power to make and amend procedure rules and will be responsible for reviewing the rules once they are in force.

7. Consultation

Summary of consultation outcome and methodology

- 7.1 As required by the Act, before making these rules, the Lord Chancellor has consulted the Senior President of Tribunals, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, and the Lord Chief Justice of Northern Ireland.
- 7.2 Only the Senior President of Tribunals provided comments and feedback on the draft rules. The MoJ was grateful for the views of the Senior President of Tribunals on the draft rules, which were considered and substantially incorporated in the preparation of the finalised rules.

8. Applicable Guidance

- 8.1 His Majesty’s Courts and Tribunals Service produces guidance for each Tribunal jurisdiction which is issued to parties at key stages of the appeals process and is available on GOV.UK.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

- 9.1 A separate Impact Assessment has not been prepared for this instrument as the wider economic impact to which it contributes has been outlined in the overarching Impact Assessment for the Illegal Migration Act.¹

¹[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal Migration Bill IA - LM Signed-final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1165397/Illegal_Migration_Bill_IA_-_LM_Signed-final.pdf)

Impact on businesses, charities and voluntary bodies

- 9.2 There is no, or no significant, impact on business, charities or voluntary bodies.
- 9.3 The legislation does not impact small or micro businesses.
- 9.4 The impact on the public sector is the implementation of a rules framework which will set out how suspensive appeals made under the Illegal Migration Act are governed. The impact is therefore on users of the Upper Tribunal Immigration and Asylum Chamber; specifically anyone who makes a suspensive appeal under the Illegal Migration Act.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

- 10.1 The approach to monitoring of this legislation in respect to the impact of any changes to the Tribunal Procedure Rules is monitored by the Tribunal Procedure Committee by way of feedback from the Tribunal and users.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 The Lord Chancellor has made the following statement regarding Human Rights:

“In my view the provisions of the Tribunal Procedure (Upper Tribunal) (Immigration And Asylum Chamber) (Amendment) Rules 2023 are compatible with the Convention rights.

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 (“relevant European Union Acts”).