EXPLANATORY MEMORANDUM TO

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) (AMENDMENT) RULES 2012

2012 No. 2890 (L. 11)

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The Tribunal Procedure (Upper Tribunal) (Amendment) Rules 2012 makes changes to the rules that apply in the Upper Tribunal; namely the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the Procedure Rules'). In particular, the change applies in respect of decisions in judicial review proceedings before the Immigration and Asylum Chamber of the Upper Tribunal. Where the Upper Tribunal gives an oral decision, the change will permit an application for permission to appeal to the Court of Appeal to be made to the Upper Tribunal immediately at the hearing.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 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 eg health, immigration and asylum and education. In addition to statutory appeals, the Upper Tribunal may also deal with certain kinds of judicial reviews.

4.2 Section 22 of the 2007 Act provides for Tribunal Procedure Rules to be made, governing the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal. It also provides for the rules to be made by the Tribunal Procedure Committee ("TPC").

4.3 Schedule 5 to the 2007 Act makes provision for the process of making the rules, and the content of those rules.

5. Territorial Extent and Application

5.1 This instrument extends to the UK.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 These Rules make a modification to the Procedure Rules that was deemed necessary by the Court of Appeal in its judgment of *R (NB Algeria) v SoS Home Department*[1]. The judgment followed an application for permission to appeal against a refusal by the Immigration and Asylum Chamber of the Upper Tribunal to grant permission to apply for judicial review.

7.2 The Court of Appeal considered there was a problem with Procedure Rule 44 which provides that a person seeking permission to appeal must make a written application to the Upper Tribunal for permission to appeal. That application must be received within one month of written reasons for the Upper Tribunal's decision. The Court considered that the requirement of having to wait for *written* reasons leads to unnecessary delay. It suggested that the Procedure Rules could be amended to enable an applicant to apply for permission to appeal as soon as they are given the Tribunal's decision.

- *Consolidation*

7.3 The Tribunal Procedure Committee does not propose to produce a consolidated version of the Procedure Rules but an informal consolidated version, which will be updated before this instrument comes into force, can be found at http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm.

8. Consultation outcome

8.1 There has been no public consultation on this amendment, although the TPC has consulted with the head of the Immigration and Asylum Chamber of the Upper Tribunal and the President of the Court of Session. The Court of Appeal judgment was discussed at length by the TPC at its October meeting, and it concluded that a new paragraph should be inserted into Rule 44 of the Procedure Rules.

9. Guidance

9.1 Her Majesty's Courts and Tribunals Service (HMCTS) produce guidance for all tribunal jurisdictions which are routinely issued to appellants at key stages of the appeals process and are available on the HMCTS website. The guidance is updated as required to reflect changes to procedure.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector is nil.

10.3 An impact assessment has not been prepared for this instrument. A Regulatory Impact Assessment (RIA) was prepared for the Tribunals, Courts and Enforcement Act. This can be found at:
http://www.justice.gov.uk/publications/tribunalscourtsandenforcementact.htm

The RIA confirmed that the legislation would create a new flexible overarching statutory framework for tribunals, bringing tribunals together in one organisation. No additional costs have been identified from the setting up of the First-tier Tribunal and Upper Tribunal in the first 3 years and no further costs have been identified to change this assumption.

[1] [2012] EWCA Civ 1050

11. Regulating small business

11.1 The legislation does not impact on small businesses.

12. Monitoring & review

12.1 MoJ will keep the tribunal rules continually under review.

13. Contact

13.1 Julie McCallen, Secretary to the Tribunal Procedure Committee, **julie.mcallen@justice.gsi.gov.uk** can answer any queries about this instrument. Paul Schagen, IAC Policy, **paul.schagen@justice.gsi.gov.uk** can answer any queries about the Court of Appeal judgment and the Immigration and Asylum Chamber of the Upper Tribunal.