



Ministry
of Justice

Monitoring the early impacts of the Legal Aid, Sentencing and Punishment of Offenders Act (2012) on onward immigration appeals

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Ministry of Justice**

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Contents

1. Summary	1
2. Background and research aims	3
2.1 Policy context	3
2.2 Research aims	4
2.3 Overview of the immigration process	5
3. Trends in legal aid volumes and expenditure	8
4. First-tier Tribunal Immigration and Asylum Chamber appeals	11
4.1 Volume of appeal receipts	12
4.2 Length of appeal process	12
4.3 Representation status	14
4.4 Appeal outcomes	15
5. Permission to appeal at the Upper Tribunal Immigration and Asylum Chamber	18
5.1 Stage 1: Applications to the FtTIAC	18
5.2 Stage 2: Applications to the UTIAC	20
6. Upper Tribunal Immigration and Asylum Chamber appeals	23
6.1 Volume of appeal receipts	23
6.2 Length of appeal process	24
6.3 Representation status	25
6.4 Appeal outcomes	25
7. Impacts of the LASPO reforms	28
7.1 Demand and access to legal advice and representation	28
7.2 Self-funding clients	29
7.3 Adapting to LASPO	29
7.4 Quality of legal advice provision	31
7.5 Unrepresented appellants	32
8. Conclusion	34
Appendix A	35
Discussion guide overview	35

List of figures

Figure 2.1 The immigration and asylum appeal process	7
Figure 3.1 Initial advice and representation claim volumes and expenditure for asylum and immigration	9
Figure 3.2 Full civil representation claim volumes and expenditure for asylum and immigration combined	10
Figure 4.1 Volume of FtTIAC immigration appeal receipts	12
Figure 4.2 Mean length of time from FtTIAC receipt to FtTIAC decision	13
Figure 4.3 FtTIAC individual appellants by representation status	14
Figure 4.4 FtTIAC appeal outcomes	15
Figure 4.5 FtTIAC appeal outcomes – represented appellants	16
Figure 4.6 FtTIAC appeal outcomes – unrepresented appellants	16
Figure 5.1 Volume of FtTIAC appeal permission applications by appellant type	19
Figure 5.2 Refusals permission to appeal to FtTIAC stage by applicant	20
Figure 5.3 Volume of UTIAC appeal permission applications by appellant type	21
Figure 5.4 Refusals permission to appeal to UTIAC stage by applicant	22
Figure 6.1 Volume of UTIAC immigration appeal receipts	23
Figure 6.2 Mean length of time from FtTIAC receipt to UTIAC decision	24
Figure 6.3 UTIAC individual appellants by representation status	25
Figure 6.4 UTIAC appeal decisions by party – appellant	26
Figure 6.5 UTIAC appeal decisions by party – Home Office	26

1. Summary

Background

The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 outlined reforms to the provision of legal aid in England and Wales. These included the removal of the majority of immigration matters from the scope of legal aid funding.

During the passage of the LASPO Bill through Parliament, concerns were raised regarding the potential impact of removing legal aid for immigration *onward appeals* in particular. As these appeals are only granted on the basis of an error of law there were concerns that lay members of the public would not be able to argue such points. The Government therefore committed to review the impacts of withdrawing legal aid from these cases at around one year post-implementation.

The immigration appeals process

An appeal can be made following a decision on an immigration application to the Home Office. Appellants can progress through a number of stages at the First-tier Tribunal and Immigration Asylum Chamber (FtTIAC) through to the Upper Tribunal Asylum and Immigration Chamber (UTIAC) and beyond to the Court of Appeal and Supreme Court.

Onward immigration appeals refer to appeals heard at the Upper Tribunal or that stay in the appeals system following an Upper Tribunal hearing.

Aims and methodology

The overall aim of the research was to explore the effects of removing legal aid for onward immigration appeals following the introduction of the LASPO reforms in April 2013. The research consisted of analysis of management information to explore trends in the immigration appeals system using trend data pre- and post-LASPO reforms, and twenty-one qualitative interviews with key stakeholders including immigration professionals and practitioners to examine the perceived impacts of the reforms.

Key findings

- Some of the issues raised in the research interviews, such as an anticipated increase in appellants who are unrepresented have not been reflected in the data. The proportion of unrepresented appellants has continued to decrease in the post-LASPO period. An anticipated increase in case processing times has however been observed in the data relating to the First-tier Tribunal (processing times have continued to decrease in the Upper Tribunal).
- A number of immigration legal service providers (including frontline organisations) interviewed for this research reported making changes to their operating models to adapt to the LASPO changes. Such changes included increasing the provision of pro bono work and establishing a separate charging arm to provide affordable legal assistance for self-funding clients.
- Stakeholders reported observing adaptations that clients have made to adapt to LASPO changes such as opting for self-funding or self-representation for all, or part, of their case.
- As expected, legal aid expenditure on immigration cases has fallen in 2013–14 compared to previous years. This reduction was driven by lower volumes of initial advice and representation and full civil representation in the post-LASPO period.
- The overall trend in volumes throughout the immigration process suggest that one year after implementation of the reforms, there is little evidence that LASPO has adversely affected cases entering or progressing through to the onward immigration appeals process. As noted by several research participants however, a longer time period is needed to observe the full LASPO effects, particularly at the onward stage.

2. Background and research aims

2.1 Policy context

The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 outlined reforms to the provision of legal aid in England and Wales. As part of these reforms the majority of immigration cases were removed from the scope of legal aid funding.

Prior to April 2013 individuals applying to the Home Office for leave to enter or remain in the UK, or for British citizenship were eligible for legal aid funded assistance for advice on their applications, if they met certain criteria. These individuals were also eligible for legal aid funded advice and representation if their application was refused by the Home Office and they chose to appeal the decision.

From April 2013, the majority of immigration cases were no longer eligible for legal aid; although the statutory provisions did include some exceptions:

- asylum, Article 2 and Article 3 European Convention on Human Rights cases;
- immigration advice for leave to remain for victims of domestic violence;
- cases heard at the Special Immigration Appeals Commission, which involve issues of national security;
- advice for persons detained under immigration act powers; and
- advice for leave to enter or remain for victims of human trafficking.

During the passage of the LASPO Bill through Parliament, concerns were raised regarding the potential impact of removing legal aid for immigration onward appeals in particular. As these appeals are only granted on the basis of an error of law, there were concerns that lay members of the public would not be able to argue such points. In April 2012 the Parliamentary Under-Secretary of State for the Ministry of Justice, the Rt Hon Jonathan Djanogly MP, therefore made a public commitment to review the impacts of withdrawing legal aid from these cases about a year post-implementation of the reforms.¹

In addition to the LASPO reforms, there have been a number of changes to immigration policy and appeals operations which are also likely to contribute to changes in volume and processing of cases in the immigration appeals system. For instance, the Tribunal Courts

¹ House of Commons Debate 24 April 2012, Volume 543 No. 293, Column 833.

and Enforcement Act 2007² led to the transfer of judicial review claims and applications for permission to apply for judicial review from the High Court to the Upper Tribunal Immigration and Asylum Chamber. In 2012 the Government implemented changes to the Immigration Rules for family migration whereby those claiming the right to enter or remain in the UK on the basis of ECHR Article 8³ would be subject to scrutiny based on ‘the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals’.⁴ In 2014, fees were reduced for legal representatives conducting legal aid funded cases. Finally, the Immigration and Asylum Chamber (IAC) has been subject to changes in resources in recent years, which have had an impact on many areas including staffing levels.⁵

2.2 Research aims

The overall aim of the research was to explore the effects of removing legal aid for onward immigration appeals following the introduction of the LASPO reforms in April 2013. The research explored the trends in immigration appeal cases and examined the perceived effects of the reforms from the perspective of immigration professionals.

The research focuses on onward immigration appeals, although as it would be difficult to isolate the effects of LASPO on just one stage of the process, this report also covers earlier stages of the immigration appeals process.

The research consisted of two strands.

- Analysis of immigration (non-asylum) appeals management information from HM Courts and Tribunal Service (HMCTS) and the Legal Aid Agency (LAA) between 2008–9 and 2013–14.⁶

² The Act came into force on 3 November 2008.

³ European Convention on Human Rights, the right to respect for private and family life.

⁴ See Home Office Statement of Intent: Family Migration, June 2012

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.pdf

⁵ Under the Immigration Act 2014, immigration appeal rights will be restricted; however, relevant parts of the Act were not in force during the period covered by management information analysed as part of the research or during fieldwork with stakeholders.

⁶ Management information provided by HMCTS covers the whole of the United Kingdom, and not just England and Wales. As Scotland and Northern Ireland only comprise approximately 3% of IAC receipts and 4% of disposals/outcomes, however, it still provides a robust picture of trends in England and Wales. HMCTS data presented in this report on ‘immigration cases’, which exclude asylum, also exclude data on Human Rights, Racial Discrimination and Deprivation of Citizenship. This is due to the fact that the first two categories are no longer in use for HMCTS recording purposes based on the main grounds of appeal but also because these form a very small proportion of IAC cases/appeals overall. Human rights does however feature as an additional ground for appeal in many cases. The review focuses on management information from the period 2008–09 to 2013–14, although it has not been possible to obtain data for the whole period for each topic analysed. Caution should therefore be exercised when making comparisons between different datasets/sources.

- Twenty-one semi-structured interviews with a total of twenty-nine participants who were selected from a range of professions, with involvement in different parts of the appeals process or in advice provision. Participants included: six members of the Judiciary, five Home Office Presenting Officers, seven frontline advice organisations, six legal professionals⁷ and five other stakeholders. Interviews were carried out between July and August 2014, four were paired interviews; and two were undertaken with three participants.^{8 9 10}

The qualitative interviews were analysed thematically to draw out key themes and therefore individual opinions and perceptions are not necessarily covered in the report. Furthermore, the views expressed during interviews cannot be generalised to the wider population.

Available management information was analysed for the period before and directly after the LASPO reforms. This does not reflect a pre and post-LASPO 'cohort' in terms of funding arrangements and many cases would still have been subject to legal aid funding if already in the tribunal system, or to transitional arrangements in place post-LASPO. Figures on the latter stages of onward immigration appeals, heard at the Court of Appeal or Judicial Review, have not been included in the report as such cases are unlikely to have entered the system post-LASPO.

2.3 Overview of the immigration process

Immigration appeals enter the system via the First-tier Tribunal Immigration and Asylum Chamber. The appeals process is summarised below.

First-tier Tribunal

- Following a decision by the Home Office, applications to appeal can be submitted to the First-tier Tribunal Immigration and Asylum Chamber (FtTIAC).
- If an application is refused, applicants are entitled to appeal the decision and must lodge an application, based on the facts of the case,¹¹ to appeal at the FtTIAC.

⁷ This also included legal professionals that did not work for private legal firms.

⁸ It should be noted that where there are multiple participants in an interview individuals can influence each other's responses.

⁹ Some legal provider participants canvassed service users for their experiences of appealing an immigration decisions post-LASPO prior to being interviewed.

¹⁰ An overview of the interview topic guide can be found at Appendix A.

¹¹ Other grounds of appeal exist including human rights and race grounds.

- If an appeal is dismissed, the appellant or the Home Office can further appeal this decision and make an *onward appeal*.
- An application for 'permission to appeal' (PTA) is made to the FtTIAC. The next appeal would be heard at the Upper Tribunal Immigration and Asylum Chamber (UTIAC); this would constitute an onward appeal.
- Prior to the LASPO reforms most asylum and immigration appeals were in scope for legal aid funding subject to appellants passing the means and merits test.

Upper Tribunal

- If the initial PTA is refused at the First-tier Tribunal, a further PTA application can be made direct to the Upper Tribunal.¹²
- A PTA can only be granted if an error of law¹³ is found in the FtTIAC decision.
- If a tribunal judge believes that the facts of the case were not fully considered at the First-tier Tribunal, the case can be remitted back to the FtTIAC. Cases can be remitted at the permission stage or from the appeal hearing.
- Prior to the LASPO reforms most asylum and immigration appeals were in scope for legal aid funding subject to appellants passing the means and merits test.
- All hearings at the Upper Tribunal are onward immigration appeals.

Court of Appeal and Supreme Court

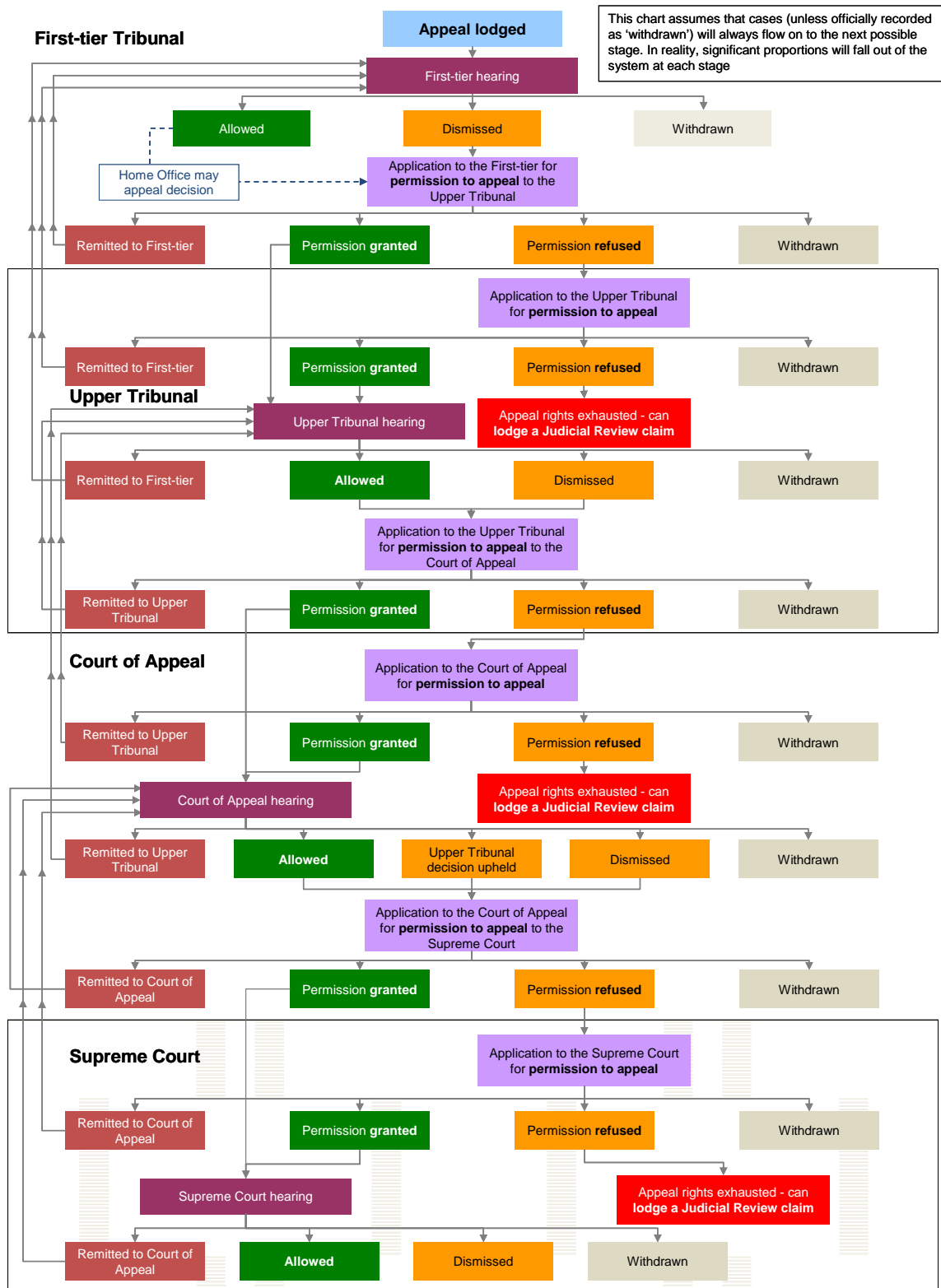
Once tribunal appeal rights have been exhausted, appeals can progress to the Court of Appeal, and finally the Supreme Court. If at any point an appellant's appeal rights are exhausted, they can in certain circumstances apply for a Judicial Review.

Figure 2.1 shows the immigration and asylum appeal process from first appeal through all possible appeal options until appeal rights are exhausted. For more information on the immigration appeals process please refer to <http://www.justice.gov.uk/tribunals>.

¹² On 15 February 2010, the Asylum and Immigration Tribunal (AIT) was replaced by the Immigration and Asylum Chamber (IAC). The single tier AIT was replaced with two new chambers - the First-tier Tribunal Immigration and Asylum Chamber and the Upper Tribunal Immigration and Asylum Chamber.

¹³ The points of law most frequently encountered in immigration appeals heard at the UTIAC (which relate to the hearing at the FtTIAC include i) failing to give reasons or any adequate reasons for findings on material matters; ii) failing to take into account and/or resolve conflicts of fact or opinion on material matters; iii) making a material misdirection of law on any material matter.

Figure 2.1 The immigration and asylum appeal process



3. Trends in legal aid volumes and expenditure

Prior to the implementation of LASPO in April 2013, legal aid funding was available to assist individuals applying to work or live in the United Kingdom. Such ‘initial advice and representation’¹⁴ and ‘full civil representation’¹⁵ was available to clients for advice on completing an initial application form to the Home Office and to help applicants appeal the decision if they were unsuccessful.

Whilst Chapter 3 of the report does not specifically relate to the onward appeal stages, it is important to understand how legal aid funding has been affected, as it will ultimately have a bearing on the number of cases that end up at the onward stage.

Data presented in this section in relation to initial advice and representation are based on claims submitted by legal aid providers to the Legal Aid Agency (LAA) at the end of a particular appeals stage, to reflect billing practise.¹⁶ Data relating to full civil representation are based on closed (or completed) cases, also reflecting billing practice. The data are therefore likely to refer to cases entering the system pre- and post-implementation of the LASPO reforms. This will affect figures on full civil representation more so than initial advice and representation as these cases tend to stay in the system longer.

As shown in Figure 3.1, data from the LAA¹⁷ show that since 2009–10, there has been a downward trend in the volume of initial advice and representation claims and expenditure¹⁸ for immigration (non-asylum) cases and that unsurprisingly, this has continued post-LASPO. There was a decrease of 38% in the volume of claims between 2012–13 and 2013–14 (from 23,581 to 14,674), compared to a decrease of 26% between 2011–12 and 2012–13 (from 31,925 to 23,581). Despite asylum remaining in scope for legal aid, there was also a decrease in initial advice and representation claim volumes and expenditure for these cases. This however constituted a smaller decrease than for immigration (non-asylum).

¹⁴ This refers to the majority of legally aided immigration matters – including representation at the First-tier and Upper Tribunals. Please note that this is different to initial advice and representation for most other categories of law, which consists mainly of advice and assistance prior to proceedings at court.

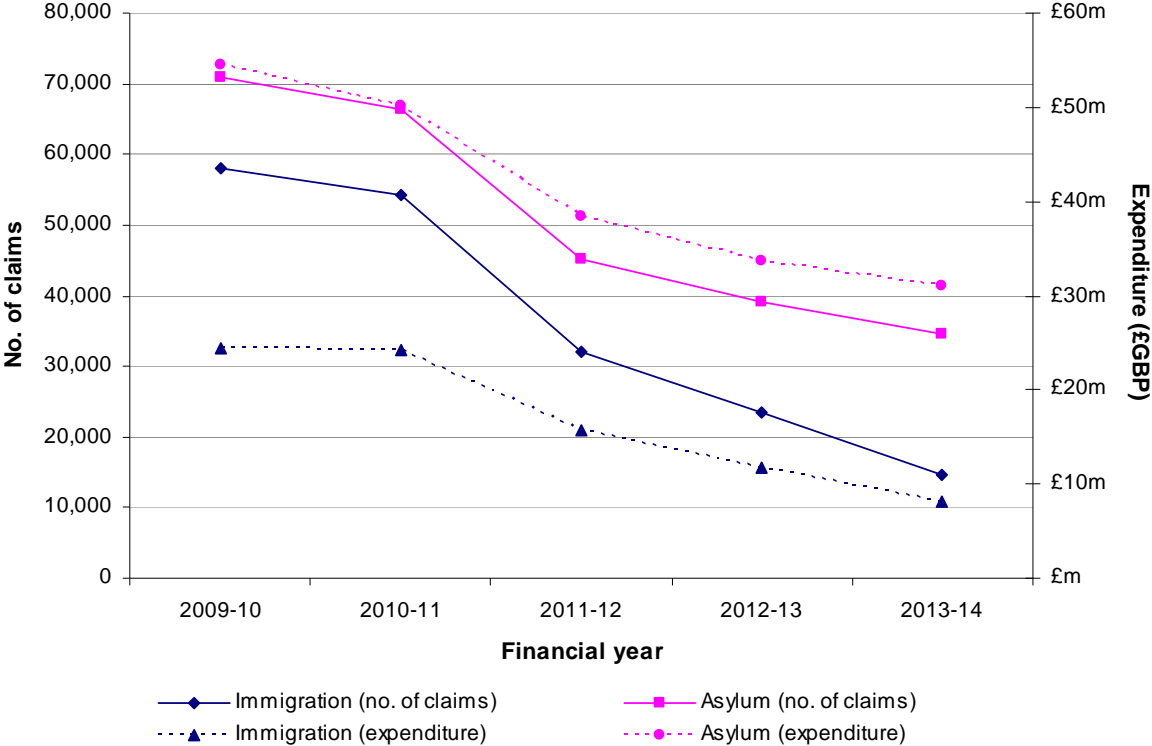
¹⁵ This mainly covers representation at higher levels of court, particularly at the Judicial Review stage for immigration and asylum.

¹⁶ LAA data does not enable counting of case volumes as it covers claims submitted by legal aid providers for work completed. Most cases would be expected to incur up to four stage claims.

¹⁷ Published here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358026/legal-aid-statistics.csv (The period 2009–10 to 2013–14 has been covered for Legal Aid volume/expenditure data as 2008–09 data was not available at the time of analysis.)

¹⁸ This covers total expenditure against claims submitted by not for profit organisations and solicitors in the period 2009–10 to 2013–14. It does not cover funding provided by Community Legal Advice Centres as data published by the LAA is not based on closed stage claims.

Figure 3.1 Initial advice and representation claim volumes and expenditure for asylum and immigration



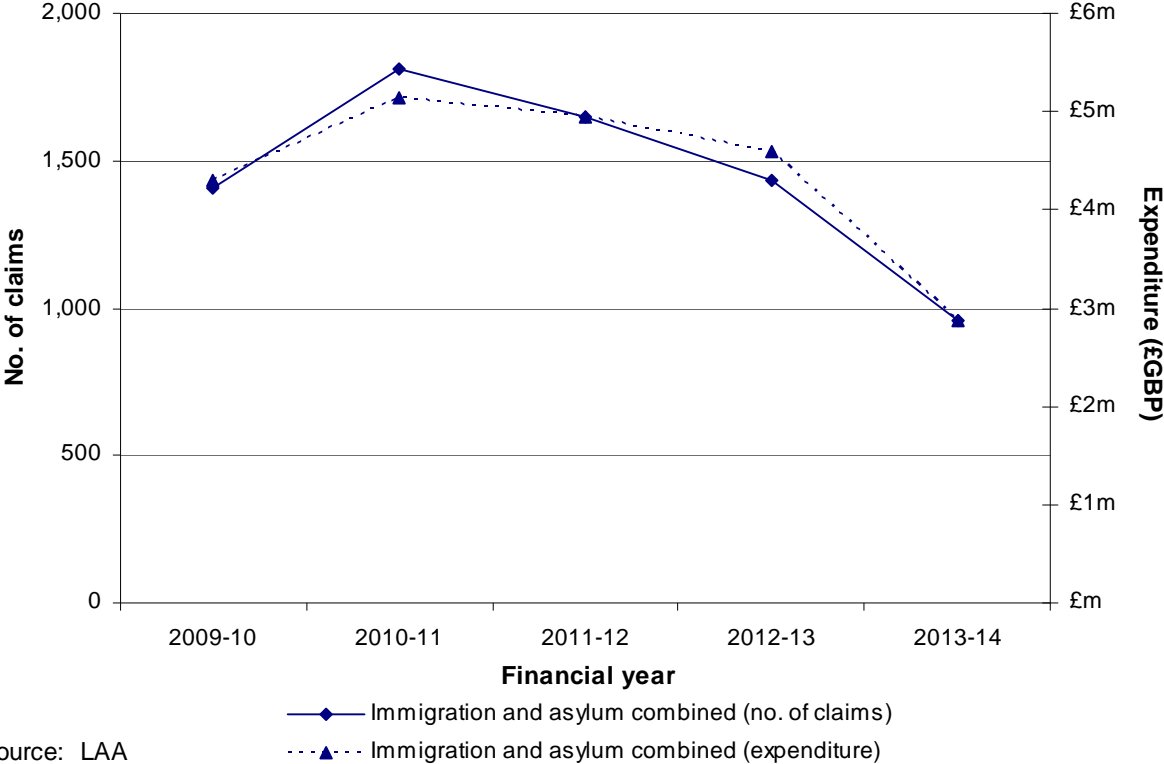
Source: LAA

Figure 3.2 shows that the number of claims¹⁹ under the full civil representation scheme and associated expenditure have also fallen since 2010–11 and as expected, this downward trend continues post-LASPO. There was a sharp decrease of 33% in claim volumes between 2012–13 to 2013–14 compared to a 13% decrease between 2011–12 and 2012–13.²⁰

¹⁹ This is for claims submitted from not for profit organisations and solicitors only where the LAA has met all costs. Claims for small contributions by the LAA but where the majority of case costs are met by the opponent, are not included here.

²⁰ Please note that figures for immigration and asylum cases are not available separately from the LAA as they are not collected in this way.

Figure 3.2 Full civil representation claim volumes and expenditure for asylum and immigration combined



4. First-tier Tribunal Immigration and Asylum Chamber appeals

An applicant can lodge an appeal at the First-tier Tribunal Immigration and Asylum Chamber (FtTIAC) following the refusal of an immigration application by the Home Office. This appeal is not part of the onward appeals process; however, it is important to understand how this stage of the tribunal process has been affected by the LASPO reforms as it affects the progress of cases to the Upper Tribunal (discussed in Chapter 6).

The interviews with stakeholders suggested that LASPO may have a number of anticipated effects on the immigration appeals process, including changes to the representation status of appellants and a potential change in the quality of legal provision supporting applicants.

There were a mixture of views regarding unrepresented appellants, and how these might affect the tribunal system post-LASPO. Some stakeholders argued that LASPO could force some applicants to progress through the system without legal help – thereby increasing the number of unrepresented appellants in the system. It was felt that this could potentially impact on the efficiency of the system by increasing the overall length of cases. Others, however, acknowledged that unrepresented appellants had always been a feature of the system and felt that there was sufficient availability of legal provision for LASPO not to have a marked impact here.

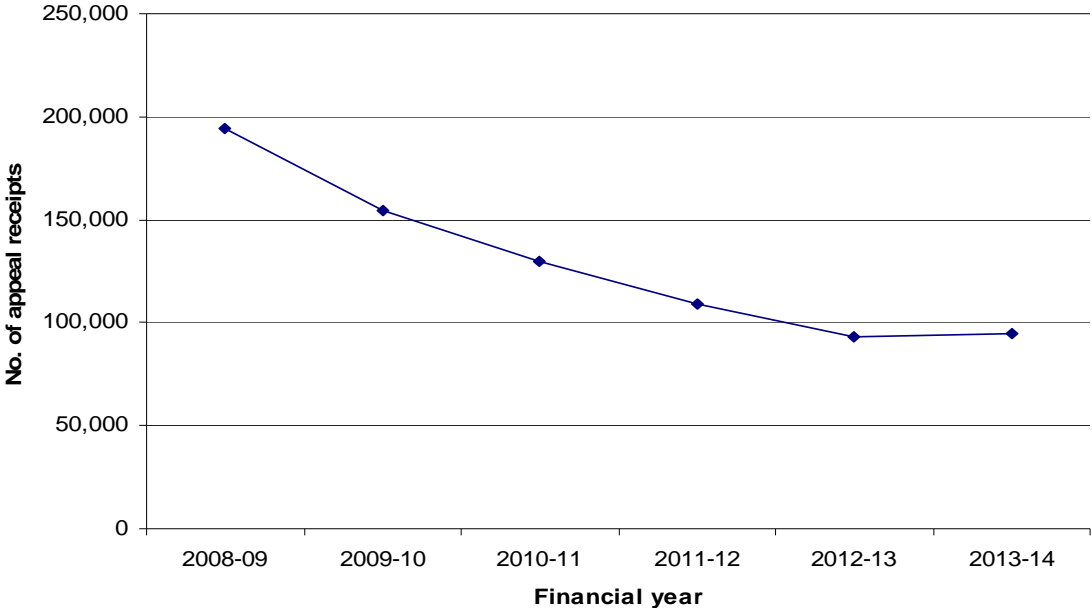
The quality of legal provision was another issue raised by some stakeholders who felt that LASPO would increase the number of self-funders in the system. They felt that there was a risk of this creating a dip in the quality of legal advice provision as applicants sought a cheaper legal service.

The data below explores trends in representation status and appeal outcomes in the First-tier Tribunal. Data presented in this chapter and Chapters 5 and 6 were extracted by HMCTS in May 2014 and relate to non-asylum cases exclusively. Figures may therefore not exactly match figures published by the Ministry of Justice after this date.

4.1 Volume of appeal receipts

As shown in Figure 4.1, the volume of immigration appeals received at the FtTIAC has decreased overall since 2008–9 but there has been a slight increase in the volume of receipts between 2012–13 and 2013–14.

Figure 4.1 Volume of FtTIAC immigration appeal receipts

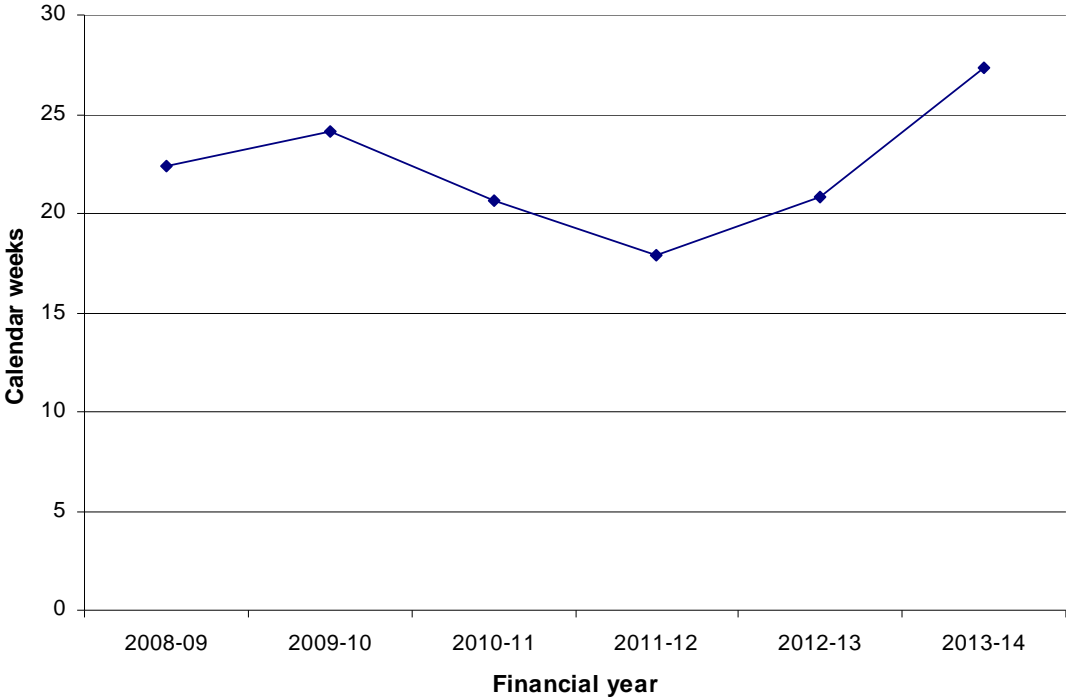


Source: HMCTS

4.2 Length of appeal process

As shown in Figure 4.2, the average (mean) length of time between an appeal being received at the FtTIAC and a decision being made was around 27 weeks in 2013–14. The majority of cases observed within the First-tier Tribunal data in 2013–14 are likely to be post-LASPO cases.

Figure 4.2 Mean length of time from FtTIAC receipt to FtTIAC decision



Source: HMCTS

There was an overall increase in the average length of time to process an immigration appeal – from just over 22 weeks in the period 2008–9 to just over 27 weeks in 2013–14. There was an upward trend in case processing times from 2011–12, although this was more pronounced in the post-LASPO period with a 16% increase between 2011–12 and 2012–13 and a 31% increase between 2012–13 and 2013–14.

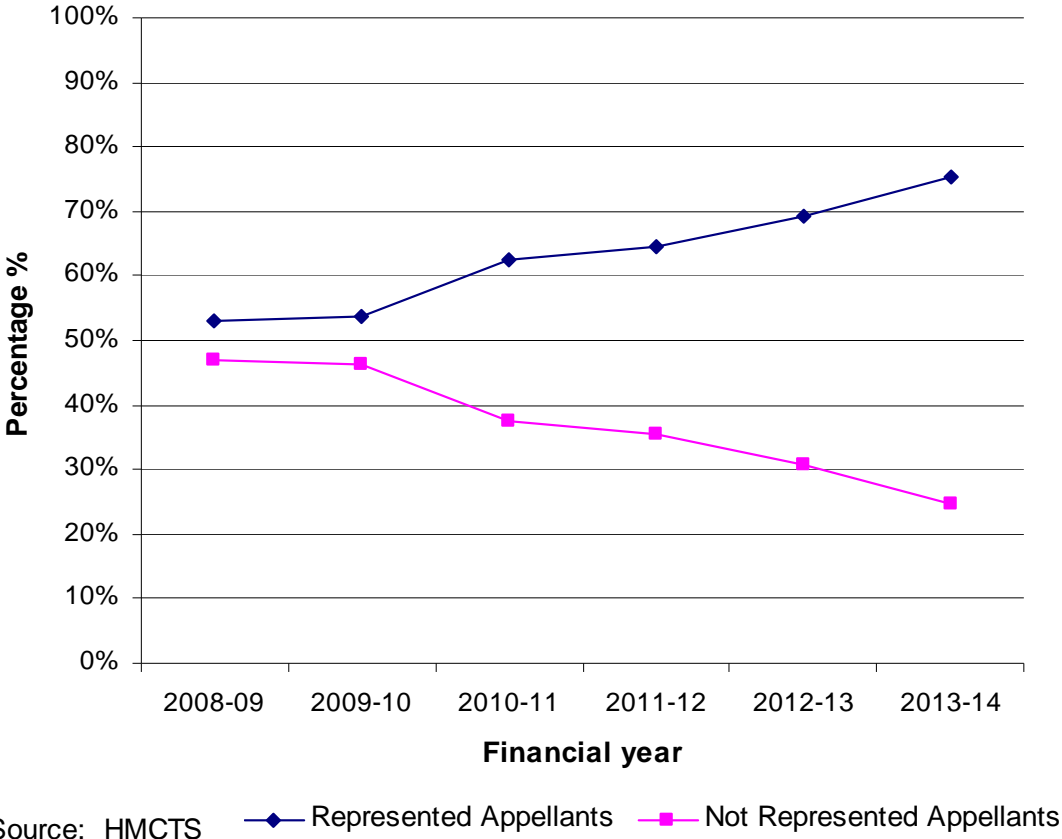
Research participants did not specifically mention cases taking longer to progress through the immigration tribunal system, although some did mention a ‘backlog’ of cases due to listing delays at the First-tier Tribunal. This was not raised as a LASPO issue, but as a resource issue linked to cuts in previous years resulting in a smaller number of FtTIAC judges that could at least explain in part the increase in case processing times.

Several participants did mention that they thought that unrepresented appellants may cause appeal hearings to become longer at times. As reported in section 4.3 of the report however, no increase in unrepresented appellants has been observed post-LASPO. The same participants also mentioned however that longer appeal hearings were being managed within current processing times, with no overall impact on the number of appeals listed to be heard.

4.3 Representation status

Figure 4.3 shows that the proportion of individual appellants with representation at the FtTIAC has increased steadily since 2009–10 and this continued following the implementation of LASPO (from 69% to 75% of all individual appellants between 2012–13 and 2013–14).²¹ This trend goes against expectations voiced by some research participants who thought that the number of unrepresented appellants may increase as a result of the reforms. This does not however provide an indication of the numbers of individual appellants who are self-funding or being represented on a pro bono basis (see Chapter 7 for more discussion on these points).

Figure 4.3 FtTIAC individual appellants by representation status

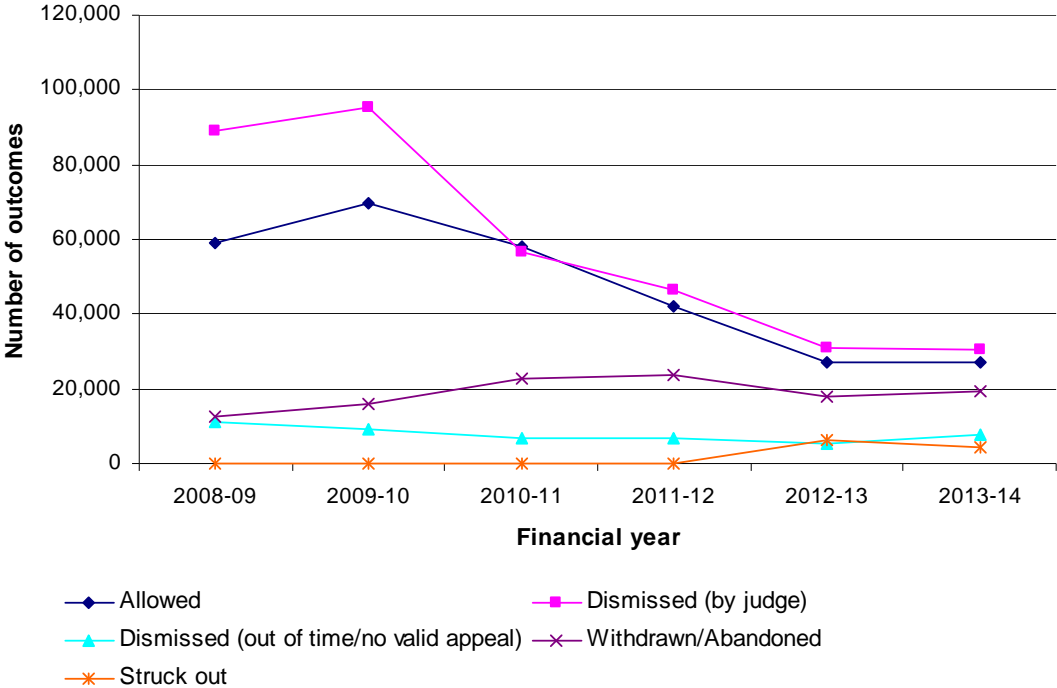


²¹ It should be noted that appellants are required by the Tribunal to formally submit details of their representation status and of their representative. However, the data may include representatives who are not legally qualified.

4.4 Appeal outcomes

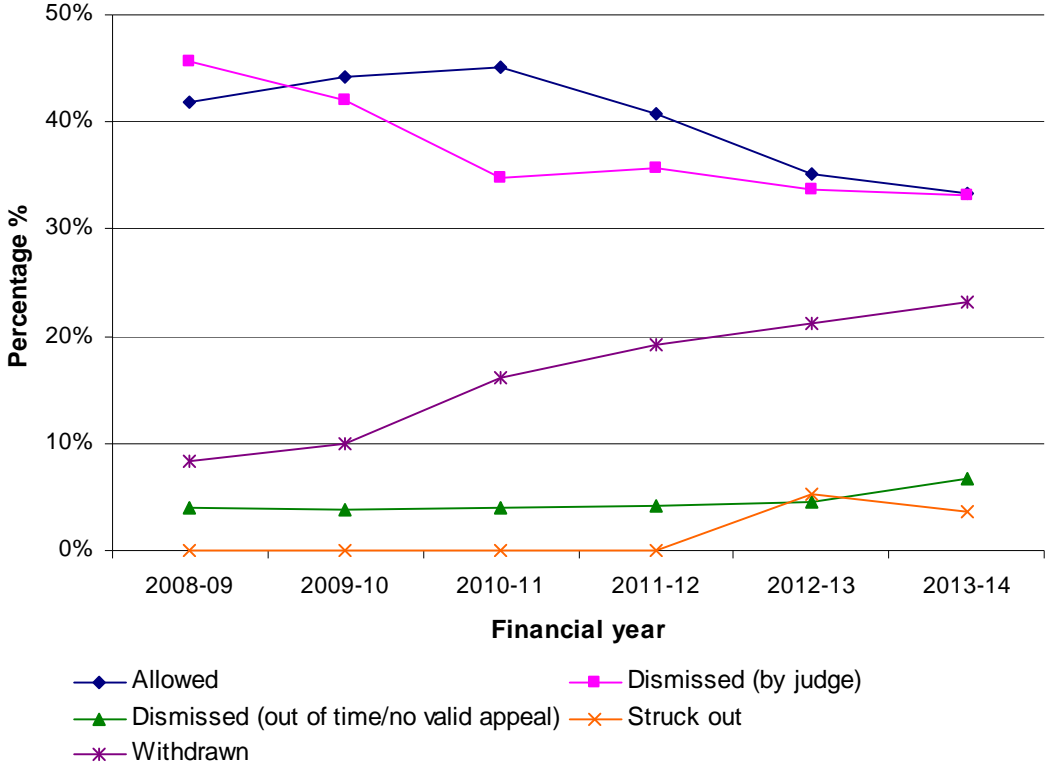
As shown in Figure 4.4, and reflecting the overall decrease in the number of receipts, there was a decrease in the numbers of appeals dismissed and allowed between 2009–10 and 2013–14. Both outcomes can potentially result in a further appeal, either by the individual appellant or by the Home Office. The number of cases that were allowed or dismissed increased slightly between 2012–13 and 2013–14 and this pattern mirrors receipts in the FtTIAC in the same period.

Figure 4.4 FtTIAC appeal outcomes



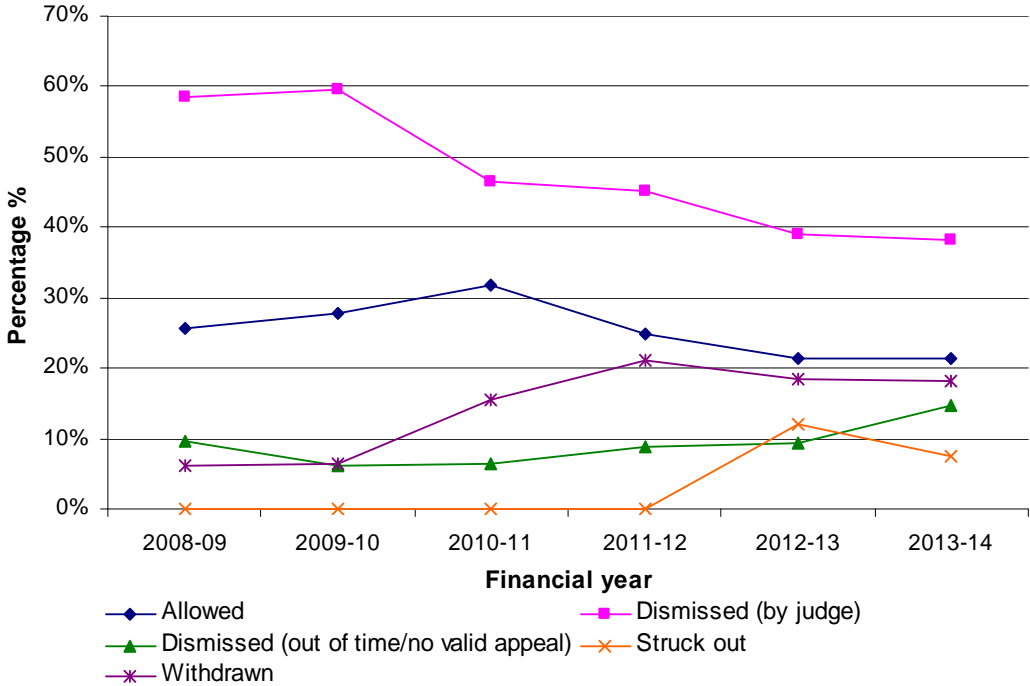
Figures 4.5 and 4.6 on the following page present outcomes by representation status for individual appellants and show only minor fluctuations in the proportions of appeal outcome trends between 2012–13 and 2013–14 in terms of whether an appeal is allowed, dismissed or withdrawn.

Figure 4.5 FtTIAC appeal outcomes – represented appellants



Source: HMCTS

Figure 4.6 FtTIAC appeal outcomes – unrepresented appellants



Source: HMCTS

It is clear from Figures 4.5 and 4.6, that represented cases are less likely to be dismissed at the First-tier Tribunal compared to unrepresented cases. This is only partly due to a higher proportion of represented cases being allowed however as represented cases were also more likely to be withdrawn.

The trend data show that there has been a small increase amongst unrepresented appellants in the proportion of appeals dismissed due to being out of time or for having no valid grounds of appeal between 2012–13 and 2013–14 (from 9% to 15%).²² There was however a small decrease in the proportion of appeals struck out due to non-payment of fee (from 12% to 8%).

The First-tier Tribunal data show no evidence of poorer outcomes for appellants and the number of represented appellants has continued to increase in the post-LASPO period. The data do however show that following the implementation of LASPO, the existing upward trend in case processing times increased further.

Appeals which are dismissed at this stage can continue through the process and appellants can seek permission to appeal (PTA) to the UTIAC. Similarly, the Home Office can also seek permission to contest cases which were allowed. If a PTA application is granted, the appeal will continue to the Upper Tribunal and at that point will be considered as an 'onward' appeal. The permissions process is covered in Chapter 5 of the report.

²² Appeals dismissed at the preliminary stage have been dismissed due to being lodged outside of the allowed time period (out of time) or where no valid grounds for appeal have been stated.

5. Permission to appeal at the Upper Tribunal Immigration and Asylum Chamber

When an appellant or the Home Office wishes to appeal a decision made at the FtTIAC, an application for permission to appeal (PTA) at the UTIAC is submitted. There are two stages whereby PTAs are submitted to the FtTIAC in the first instance, and if permission is refused, appellants (including the Home Office) have the further option of submitting a PTA to the Upper Tribunal (UTIAC).

5.1 Stage 1: Applications to the FtTIAC

Following a steady fall in the number of PTA applications for immigration appeals made at the FtTIAC since 2009–10, the total number then increased sharply by 33% between 2012–13 and 2013–14: up from 14,862 to 19,833.²³

As shown in Figure 5.1 there was a rise in applications to the FtTIAC from both individual appellants and the Home Office between 2012–13 and 2013–14. The majority of applications were made by individual appellants, which rose by 18% from 12,896 to 15,247. Despite being smaller in number, the increase was particularly pronounced for Home Office applications which rose from 1,962 in 2012–13 to 4,583 in 2013–14; an increase of 134%.²⁴

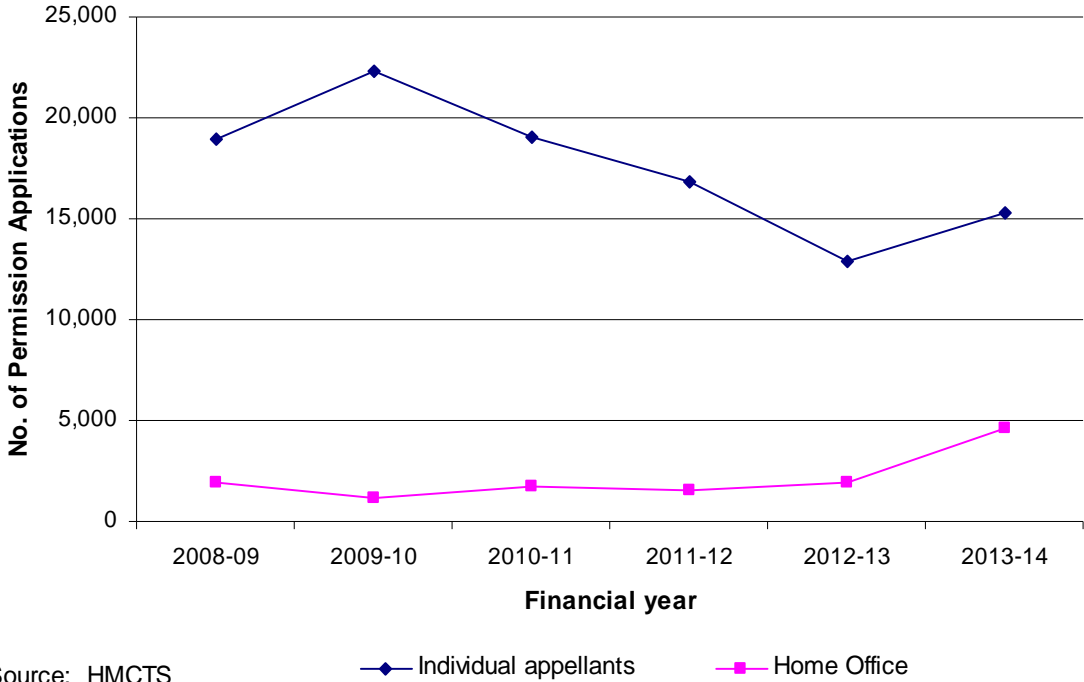
In the absence of any marked changes to outcomes at the First-tier Tribunal (see Figure 4.4) it is unclear why PTAs have seen such a marked increase since 2012–13. As the increase in PTAs is greater in relation to Home Office cases however, this is likely to be related to internal Home Office policy rather than a LASPO effect.²⁵

²³ Note that figures for 2008–09 and 2009–10 have been taken from the High Court Review (Filter) process in the former Asylum and Immigration Tribunal.

²⁴ There were four PTA applications in 2012–13 where the party was not recorded in HMCTS data and three applications in 2013–14.

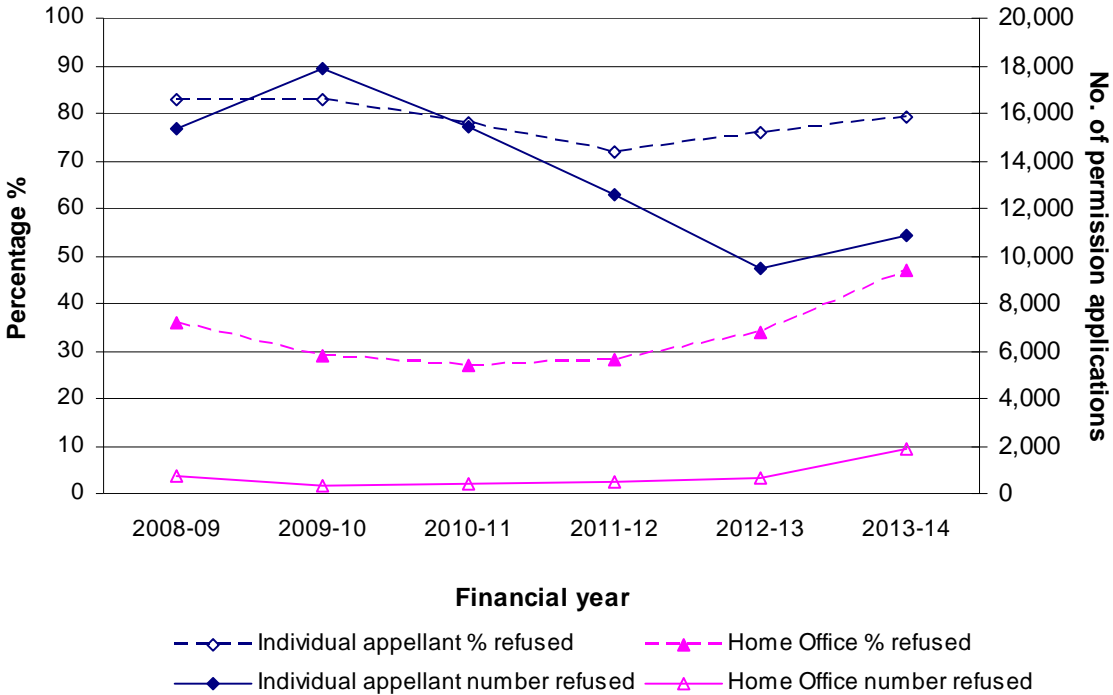
²⁵ The Home Office made changes to the Immigration Rules in July 2012.

Figure 5.1 Volume of FtTIAC appeal permission applications by appellant type



The total number of permission applications that were refused decreased from 18,341 in 2009–10 to 10,100 in 2012–13, then increased by 26% on the previous year to 12,745 in 2013–14. As shown in Figure 5.2, which includes figures where the applicant type was known, a higher proportion of individual appellant PTA applications are refused, when compared to those submitted by the Home Office (79% of individual appellant applications were refused, compared to 47% of Home Office applications in 2013–14).

Figure 5.2 Refusals permission to appeal to FtTIAC stage by applicant



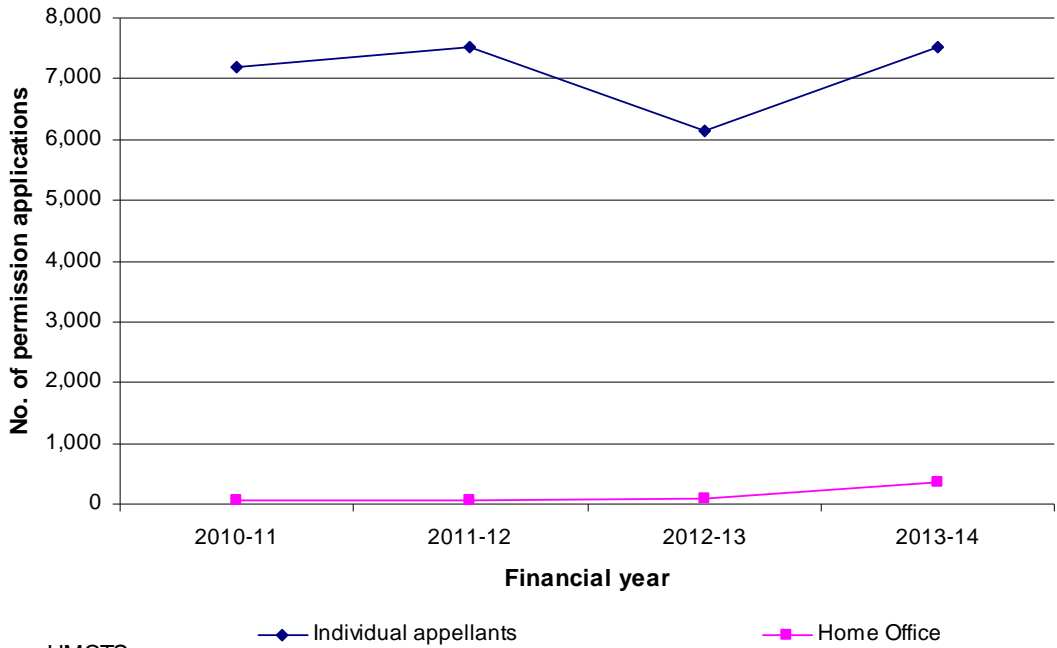
Source: HMCTS

5.2 Stage 2: Applications to the UTIAC

Since 15 February 2010 it has been possible for an appellant to make a further application to the UTIAC for permission to appeal if their application for permission to appeal to the FtTIAC has been refused. This new process was made available alongside the creation of the Immigration and Asylum Chamber (IAC) which replaced the former Asylum and Immigration Tribunal. Data in this section therefore only starts at 2010–11.

The volume of PTA applications for immigration appeals made to the UTIAC were substantially lower than at the FtTIAC with 358 Home Office PTAs in 2013–14 and 7,516 from individual appellants (compared to 4,583 and 15,247 respectively at the FtTIAC). The trends in PTA applications at the UTIAC do however mirror the trends seen at the FtTIAC, with a fall in applications from individual appellants between 2010–11 and 2012–13 followed by a 22% increase between 2012–13 and 2013–14 (from 6,148 to 7,516). Also, as shown in Figure 5.3, applications from the Home Office rose over the period 2011–12 to 2013–14 with a sharp rise between 2012–13 and 2013–14 (from 91 to 358).

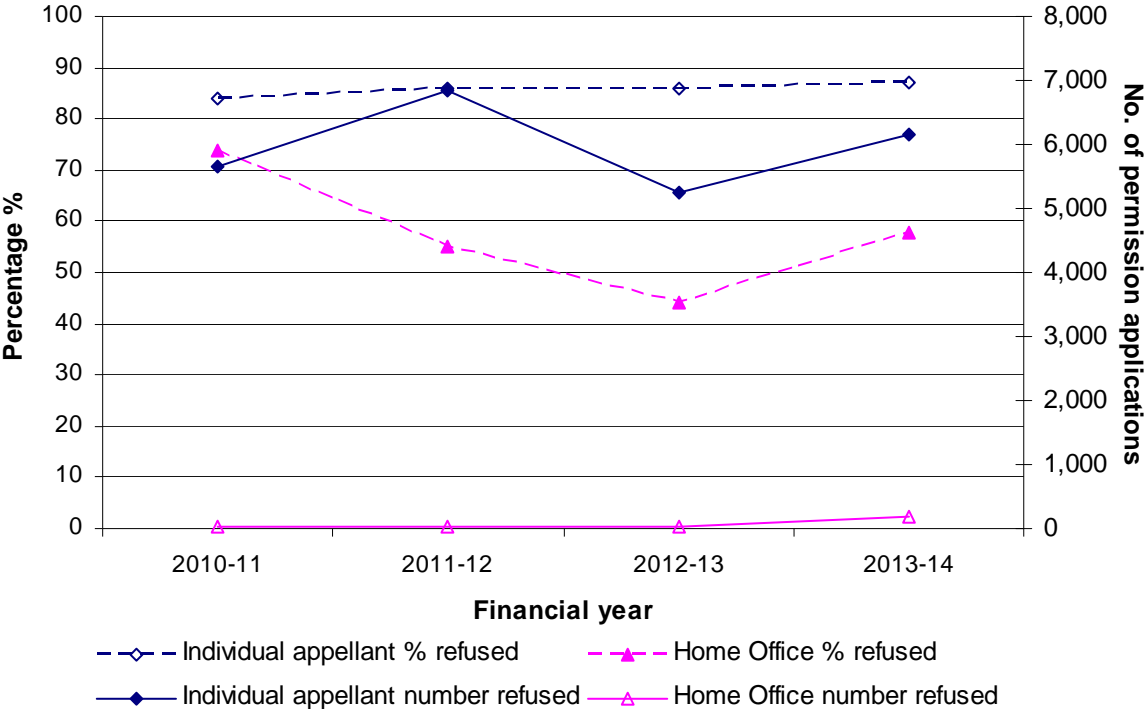
Figure 5.3 Volume of UTIAC appeal permission applications by appellant type



Source: HMCTS

The number of PTA applications granted at the UTIAC since 2010 has remained stable. The number of PTAs refused however was slightly less stable and reflects the trend seen in UTIAC permission applications overall with an increase in refusals since 2012–13. This increase was particularly marked for the Home Office and is most likely explained by a change in internal Home Office policy which has resulted in higher numbers of permission applications being made.

Figure 5.4 Refusals permission to appeal to UTIAC stage by applicant



Source: HMCTS

At both permission to appeal stages, there has been an increase in the number of PTAs between 2012–13 to 2013–14. There has also been an increase in refusals, however the volume of appeals has still led to an overall increase in the number of cases progressing to an appeal at the Upper Tribunal.

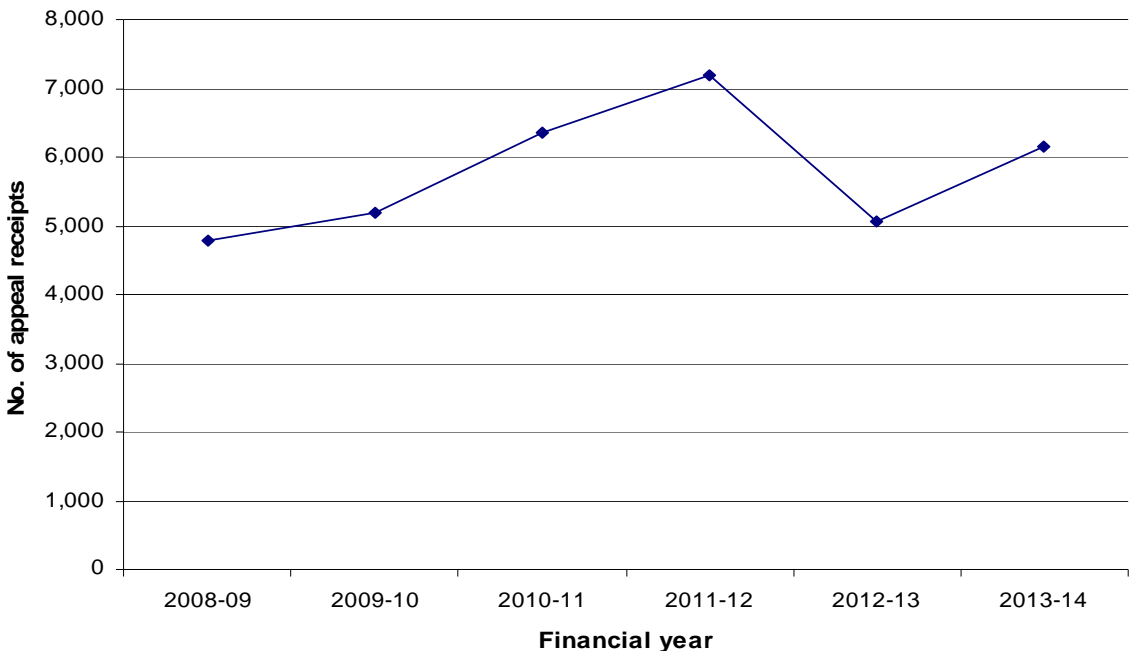
6. Upper Tribunal Immigration and Asylum Chamber appeals

An appeal will reach the UTIAC where permission has been granted following a successful permission to appeal application to the FtTIAC or UTIAC.²⁶

6.1 Volume of appeal receipts

As can be expected, given the recent rise in PTAs, there has been a 22% increase in annual receipts at the UTIAC in 2013–14 on the previous year. The level of receipts in 2013–14 however was slightly lower than those seen in 2010–11 and 2011–12. Much of the data presented in this chapter will refer to pre-LASPO cases and so caution should be exercised when interpreting these data in light of the LASPO reforms. Nonetheless, the overall increase in receipts at this stage does suggest that the LASPO reforms have not had a significant impact on deterring appellants from progressing their appeals through the immigration system.

Figure 6.1 Volume of UTIAC immigration appeal receipts



Source: HMCTS

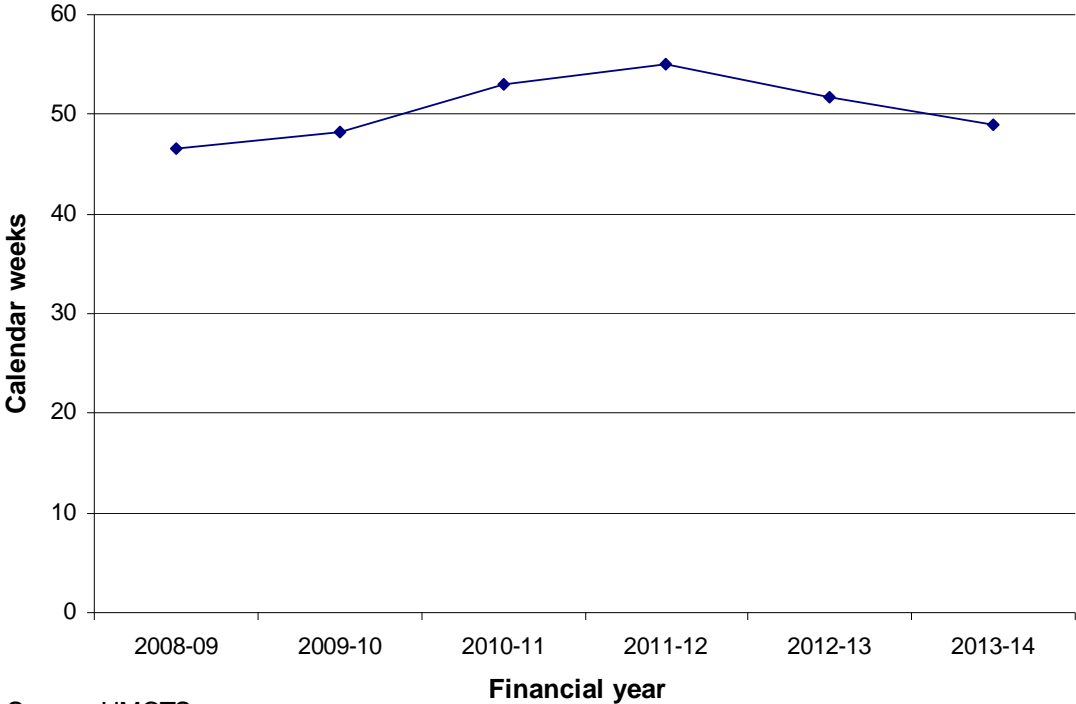
²⁶ Please note that figures in this section dating before 2010–11 relate to the Reconsideration stage of the Asylum and Immigration Tribunal (predecessor to the Immigration and Asylum Chamber).

6.2 Length of appeal process

As shown in Figure 6.2, the average (mean) length of time for a case to be processed from receipt of an appeal at the FtTIAC to a decision being made at the UTIAC was just under 50 weeks in 2013–14. It is likely therefore that most of the cases that have reached an outcome at the UTIAC in the 2013–14 data are pre-LASPO cases. Listing delays mentioned by some participants in relation to the FtTIAC and also at the UTIAC are also likely to affect the proportion of cases at the UTIAC subject to post-LASPO funding rules.

The average (mean) length of time between an appeal being received by the FtTIAC and a decision being made at the UTIAC has decreased between 2011–12 and 2013–14 (from 55 weeks to 49 weeks).

Figure 6.2 Mean length of time from FtTIAC receipt to UTIAC decision



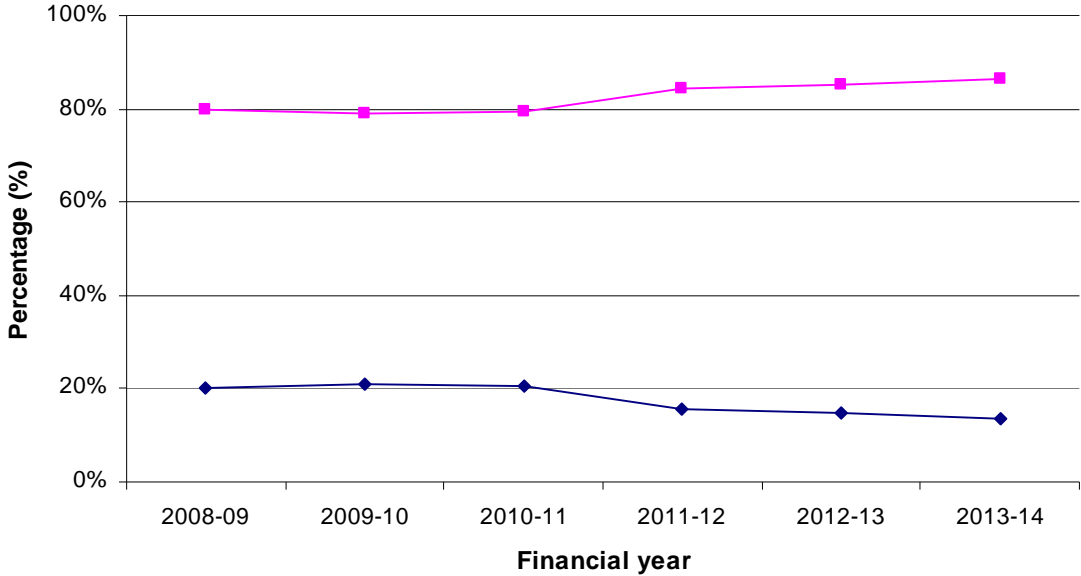
Source:HMCTS

The following section is based on outcome data from UTIAC appeals determined by a judge up to 2013–14, and so most of these will reflect pre-LASPO cases.

6.3 Representation status

Since 2010–11, there has been a gradual increase in the proportion of individual appellants with representation who have had UTIAC appeals determined by a judge; the proportion was 79% (n=5,822) in 2010–11 and 87% (n=6,549) in 2013–14.²⁷

Figure 6.3 UTIAC individual appellants by representation status



Source: HMCTS

◆ % Not Represented ■ % Represented

There were no discernible differences in the proportions of appeals granted by representation status as 35% of represented and 33% of unrepresented appeals were granted in 2013–14.

6.4 Appeal outcomes

Due to the length of time for a case to reach a final outcome at the UTIAC, the majority of outcomes in 2013–14 are likely to relate to pre-LASPO cases. Caution must therefore be exercised in drawing conclusions based on the implementation of the LASPO reforms.

Just under a third (30%) of appeals determined by a judge in 2013–14 were Home Office led (n=1,974) and 69% were individual appellant led (n=4,545).²⁸

²⁷ Appellants are required by the Tribunal to formally submit details of their representation status and of their representative. However, the data may include representatives who are not legally qualified.

²⁸ The appealing party was recorded as ‘unknown’ in 1% of cases.

As seen in Figure 6.4, the downward trend of allowed appeals from individual appellants continued in 2013–14. Conversely, Figure 6.5 shows a higher proportion of Home Office appeals were allowed in 2013–14 compared to previous years.

Figure 6.4 UTIAC appeal decisions by party – appellant

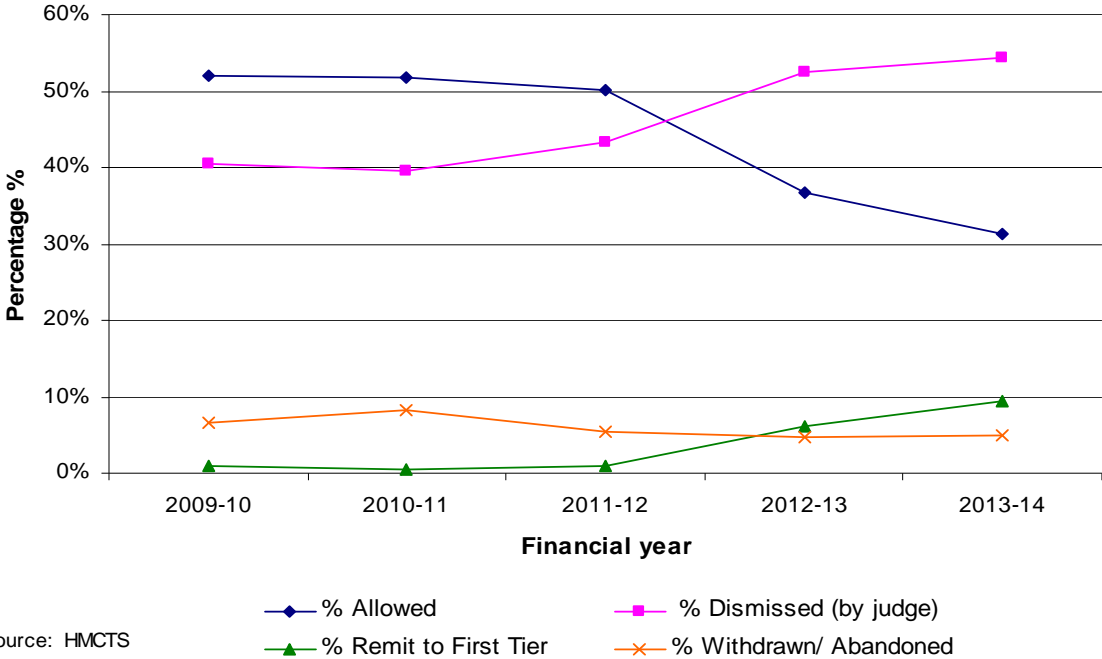
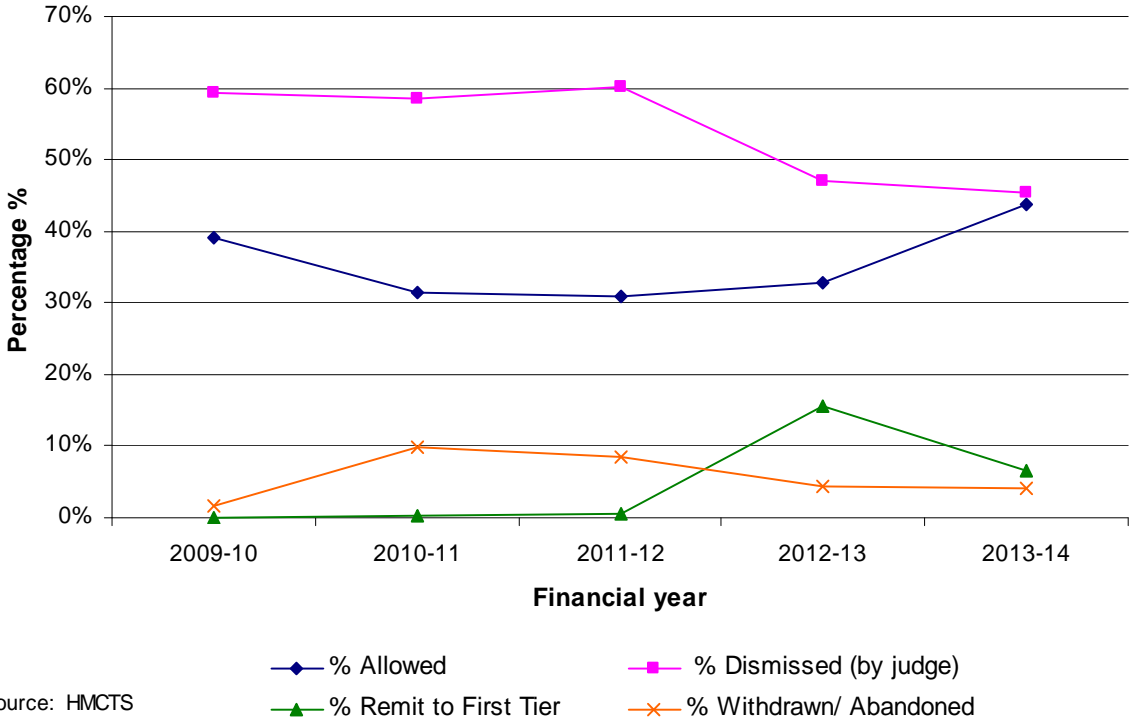


Figure 6.5 UTIAC appeal decisions by party – Home Office



Despite the challenges faced by appellants entering the appeals system, there is nothing, so far, in the data to suggest that the LASPO reforms have had an impact on cases progressing through to the Upper Tribunal.

7. Impacts of the LASPO reforms

The data presented in this report showed that there has been little change to trends in the immigration appeals process in the period following the implementation of the LASPO reforms, but they also suggested that it is too early to explore the full effects of the LASPO reforms. The twenty-one qualitative interviews conducted as part of the research however highlighted a number of changes and adaptations that had been made post-LASPO and are discussed below.

7.1 Demand and access to legal advice and representation

There were mixed views amongst the legal professionals interviewed as to changes in the demand for legal advice on immigration matters following the implementation of LASPO. Several legal professionals felt that demand for immigration legal advice had remained stable but thought that access to advice may now prove problematic for some appellants. Law Centre closures were cited as one possible reason for reduced access; another suggestion was that firms that had previously specialised in legal aid cases might not now be taking on clients who would have previously received legal aid and therefore were having to seek advice elsewhere.

There were also mixed views amongst the advice organisations interviewed regarding client demand for immigration advice. A few organisations mentioned that more clients were making early enquiries in relation to immigration matters; accessing advice through a free telephone service or asking for advice on an initial immigration application (see also section 7.3). A different organisation, however, felt that numbers may have decreased and thought this may be because people did not think they were entitled to or could get help for an immigration appeal. They also commented that if applicants were not able to obtain funding to help to pay the initial application fee to the Home Office, then there would be fewer people entering the system in the first instance. As with some of the legal professionals, a few organisations raised the issue of access to advice; one mentioned they were currently taking fewer cases on due to reductions in funding. Another felt that difficulties in finding representation could deter appellants from entering the appeals process.

7.2 Self-funding clients

Many of the stakeholders suggested that where individuals could not afford to pay for legal advice or services, their friends, neighbours or their communities may step in to offer help. Some advice organisations and legal representatives offered an insight into some of the difficulties faced by individuals when deciding how to use the limited funds to best support their case. Once people are able to secure money to fund advice, they were reportedly faced with having to make a choice between having a solicitor or barrister, or obtaining an expert report to support their appeal.

7.3 Adapting to LASPO

Ways of working

Legal professionals and advice organisations reported needing to adapt following changes to legal aid funding and were considering alternative ways to provide advice to clients. One advice organisation commented that some organisations, such as not for profit organisations and law centres, were establishing a separate charging arm to provide affordable advice to self-funded clients. Another advice organisation mentioned they were receiving an increasing number of enquiries through a free telephone advice line and had more people attending a reduced fee drop-in clinic for advice on application documentation:

we're having more and more clients coming in through the [...] helpline for free advice and also I think we have probably about 25 enquiries a week ...where they've just been refused or they've somehow managed to lodge their own appeal and they're wanting assistance for the actual appeal hearing – very often they'll come in with a semi-completed or completed application form and supporting documents and just want that to be checked over before they send it off themselves. (P4)

One advice organisation described the need to be selective in choosing which immigration cases to take on due to restrictions in funding in the post-LASPO environment:

So we're still finding the possibility to assist people. I see many people, we give advice sessions, external advice sessions, and each time there are so many and we choose the most complex and the most compelling to take on – but it's a drop in the ocean what we can do.(P5)

Private law firms also had to make adaptations post-LASPO. One legal professional commented that they were having to take on a lot more private work “in order to remain

operational as a department” as they had previously specialised in legal aid funded immigration work, a large amount of which was Article 8²⁹ related and is no longer in scope for legal aid.

Another legal professional commented that immigration cases that would have received legal aid funding pre-LASPO were now coming through private solicitors who were instructing barristers on behalf of clients. The participant thought that the quality of instruction provided by private solicitors in these cases had deteriorated post-LASPO. This was because non specialist firms were taking on these cases and were not giving the same level of attention that legal aid firms/solicitors and other specialist providers (such as Law Centres) had afforded them previously.

A few legal profession and advice organisation stakeholders also commented on the perceived lack of incentive to take on appeals past the First-tier Tribunal. This was due to the removal of the elevated fee (referred as ‘the uplift’)³⁰ paid to legal representatives taking on appeals to the Upper Tribunal in recognition of the risk involved before permission to appeal had been granted:

there’s been a fee cut for work, the uplift for work in the upper tribunal has been removed...previously you would be able to, if you did work where you lost in the First-tier and then you apply for permission to appeal, so you’re doing it at risk, then if your permission to appeal is granted, then you would be able to claim a slightly elevated fee for your work, because you were working at risk. (S4)

Pro bono work

The general perception amongst the majority of different stakeholders interviewed was that there had been an increase in the amount of pro bono or reduced rate work undertaken post-LASPO both by legal firms and frontline organisations. One judge thought they had seen more immigration cases being taken on by the Bar Pro Bono Unit. Several interviewees mentioned providing legal advice for a part of a case but not necessarily seeing the whole of the case through:

We either do it pro bono or they don't have representatives and they have to do it themselves, or some sort of a mixture of those two, in that solicitors will probably try and be helpful and assist them with their grounds of appeal but then have to stop representing at the point where they need to go to the tribunal. (BA1)

²⁹ Article 8 of the European Convention on Human Rights relates to the right to a family life and is often used as an additional ground for appeals to remain in the UK.

³⁰ The uplift constituted an additional 35% payment and was removed in December 2013.

Some providers (and a judge) suggested that the greater amounts of pro bono work being carried out were not sustainable. Much of the pro bono work being carried out by advice providers and legal representatives was described as relating to cases where the main ground of appeal was not Article 8 (Human Rights), but where this was stated as additional grounds.³¹ When dealing with these mixed cases, legal practitioners sometimes reported feeling that to act in the best interests of their client they would work on the Article 8 element of the case pro bono. Some members of the Judiciary and also legal representatives thought that Article 8 was increasingly being used for additional grounds of appeal (one judge in particular felt that this was common place).

Exceptional Case Funding (ECF)³² was mentioned by several participants (mainly legal representatives) in the context of pro bono work. One legal representative mentioned that they were spending a lot of time working pro bono to assist with ECF applications and indicated that this was a growing area of work post-LASPO. ECF was mentioned by another participant in relation to mixed cases (see above), where clients may choose to apply for this type of funding for an Article 8 argument but would not necessarily be eligible to receive funding for other parts of their case. Working at risk was also raised by one stakeholder who explained that there was little incentive for legal representatives to assist with ECF applications as the work on the case would need to be carried out at risk (of not being paid) until a decision on funding was made:

You can apply for an exceptional case determination and get legal aid for say an Article 8 family life type case, but what is the incentive to do that? You've got to do the work at risk to argue for legal aid. You've got plenty of people coming through your door that straightforwardly qualify on asylum grounds. Why would you bother doing a whole bunch of work at risk for an Article 8 family life case when you've got enough? (A1)

7.4 Quality of legal advice provision

The majority of stakeholders felt that the quality of legal advice provision was a concern before the implementation of LASPO, although several judges and legal professionals/advice providers interviewed suggested that the LASPO reforms may be encouraging more low cost and lower quality providers to compete for work in this area.

³¹ Practitioners referred to these as "mixed cases".

³² This funding can be applied for if an appellant believes that a refusal to grant Legal Aid constitutes a breach of their Human Rights Act 1998 rights, or of their rights to the provision of legal services that are enforceable EU rights. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309100/legal-aid-chancellor-non-inquests.pdf

Despite Office of the Immigration Services Commissioner (OISC) and Solicitors Regulation Authority (SRA) regulations, some stakeholders felt there could be an increase in the number of people vulnerable to poor advice, going to unregulated providers:

So there has been a longstanding problem with quality of advice for immigration law but I suppose the concern is that by removing legal aid you do two things. One is that you remove one level of control because of the quality mark and the accreditation that you have to give advice under the legal aid scheme. And secondly, you leave people who don't have very much money because otherwise they wouldn't have gone for legal aid at all, but are desperate for advice, and therefore you make a bigger market for people who are willing to charge lots of money or an amount of money but do nothing for it. (S2)

One advice provider thought that they had been “doing a lot of fixing work” post-LASPO for cases that had been through the First-tier Tribunal and had been “damaged through poor legal assistance”. They explained that these cases were difficult to deal with as previous (Judicial) decisions would have been made based on the evidence provided at the First-tier.

A few participants did not share the view that quality of advice would decline post-LASPO; in fact they suggested that the removal of immigration from legal aid scope would encourage a higher quality of legal provision. For instance, one advice provider suggested that as more clients became self-funded, the legal market would have to react by providing more affordable, quality advice.

7.5 Unrepresented appellants

The data suggest that there has been no increase in unrepresented appellants at the one year point at either Tribunal following the LASPO reforms, however it was clear from the interviews that there was an appetite amongst participants to discuss this issue, and in particular, the subsequent effects that an increase in unrepresented appellants may have on the system.

Some members of the judiciary interviewed for the research suggested that without the benefit of legal advice, unrepresented appellants may arrive at the First-tier Tribunal hearing without the necessary documentation. As FtTIAC judges are only able to make a decision based on the evidence presented at the appeal hearing, it was felt that some unrepresented appellants may fail to progress their appeal simply by not being aware of the evidence required at hearing. They continued to explain that the immigration appeals process can seem complex to appellants and the lack of knowledge of what they need to provide at each

stage of the tribunal process could potentially hinder their chance of a successful outcome. This view was shared by some frontline advice organisations. The views expressed here were based on more general experiences of unrepresented appellants rather than on experiences post-LASPO specifically.

Most of the judges interviewed as part of the research felt it was their duty to assist unrepresented appellants, often making an effort to explain the proceedings in the tribunal and what needs to be addressed. It was clearly stated, however, that it is not the judge's role to gather evidence on behalf of the appellant and that a decision can only be based on the arguments and evidence presented at the hearing. Some judges reported having to undertake more research on the parties appearing in front of them when they were unrepresented. Some felt they spent more time on questioning and/or assisting unrepresented appellants to help tease out the facts of the case to help judges make what they feel is a fair decision. While judges could only make decisions based on what is presented at the hearing, most were concerned that the quality of their decisions reflected the arguments and evidence presented by appellants. Supporting unrepresented appellants in court was not limited to judges. Some Home Office Presenting Officers expressed views similar to those expressed by judges, with many feeling they were assisting unrepresented appellants more now than they used to:

I would make sure I find them now and try and talk to them before we go into court. So that we can work out whether or not they've got their case in order before we start. Because it's unlikely, with a litigant in person,³³ that you're going to get a bundle before the hearing. It's always as well to make sure that they have all the right bits of paper to do with the hearing as necessary, even the grants and permissions and things like that and do they fully understand them. (HP1)

³³ This means an unrepresented appellant.

8. Conclusion

The findings in this report show that there has been little change in trends in the immigration appeals process in the period following the implementation of the LASPO reforms. The data show however that it is too early to explore the full effects of LASPO on onward immigration appeals, due to the time taken for cases to progress through the immigration appeals system.

Some of the issues raised in the research interviews such as an anticipated increase in unrepresented appellants have not been reflected in the data; the proportion of unrepresented appellants has continued to decrease post-LASPO. An anticipated increase in case processing times has however been observed in the data relating to the First-tier Tribunal (processing times have continued to decrease in the Upper Tribunal).

Legal professionals and practitioners reported having to make a number of changes to their operating models to adapt to the LASPO changes both to make sure that access to advice is provided and to enhance their own sustainability. Such changes included increasing the provision of pro bono work and establishing separate charging arms to provide affordable legal assistance for self-funded clients. Stakeholders also reported observing adaptations that clients have made such as opting to self-fund or sometimes opting for 'unbundled services' so that they seek advice for some services and then self-represent on other elements of their case. A perceived risk to self-funding clients was firmly voiced by some stakeholders, who felt that there may be a risk to the quality of legal advice and representation offered as an affordable service. Others however did not share this view, and thought that quality may increase due to the change in the market.

The data presented in this report however do not indicate that one year after implementation of the LASPO reforms, the reported challenges faced by providers and clients have affected the number of people entering the immigration appeals system as the numbers have remained relatively stable since 2012–13.

As expected, the volume of initial advice and representation and full civil representation cases has decreased in the post-LASPO period, as have the costs associated with such cases.

The overall trend in volumes throughout the immigration appeals process suggests that at the one year on point, LASPO has not affected cases entering or progressing through to the onward immigration appeals process. Due to case duration however, a longer time period is needed to observe the full LASPO effects.

Appendix A

Discussion guide overview

Interview topic guides were tailored to each practitioner/ professional group and used to facilitate interviews. Topic guides broadly reflected the overview provided below.

Purpose of research

- Discussions are taking place as part of a review of the removal of Legal Aid provision for the majority of immigration onward appeals.
- Aim is to establish what the impacts have been on a variety of stakeholders including appellants, the Immigration and Asylum Tribunal System, other authorities (such as the Home Office) and on legal practitioners.
- Whilst focus of the research is on the impact of removal of Legal Aid on onward appeals, we will also explore, where possible, the effect on the whole immigration system including First-tier Tribunal.
- For any of the questions below, we are seeking a discussion of views/experiences of any impacts that have been observed (or anecdotal evidence) rather than hard figures (which will be analysed in the second stage of the research).

Overview of discussion topics for use with participants [asked in different order depending on participant]

Role and remit of participant

1. To help us understand the participant's experience of immigration appeals, we'd like them to provide a brief overview of their roles and knowledge of the Legal Aid reforms introduced in April 2013.

Impact of Legal Aid reforms on the Immigration and Asylum Tribunal system

2. What do you feel have been the impacts of the Legal Aid reforms on the Immigration and Asylum Tribunal system? We'd like to explore any changes in:
 - Appeals being lodged at the First-tier/Upper Tribunal/ Court of Appeal stage [*subject to knowledge of these stages*]
 - Appeals awarded permission to appeal at the First-tier/Upper Tribunal/ Court of Appeal stage
 - The range of cases being allowed or dismissed

Impact of Legal Aid reforms on appellants

3. What do you feel have been the impacts of the Legal Aid reforms on appellants? We'd like to explore any changes in the:
 - Behaviour of appellants (such as the number of and type of appeals brought by appellants)
 - Quality of immigration legal services used by appellants
 - Number of unrepresented appellants (litigants-in-person)
 - Challenges faced by unrepresented appellants
 - Ability to access justice through the appeals process

Impact of Legal Aid reforms on Judiciary and operational staff

4. What do you feel have been the impacts of the Legal Aid reforms on the Judiciary and operational staff? We'd like to explore changes in the:
 - Workload and resources on the Judiciary and operational staff
 - Amount and type of support required for unrepresented appellants
 - Any other impacts on the Judiciary and operational staff

Impact of the Legal Aid reforms on other stakeholders

5. What do you feel have been the main impacts of removing Legal Aid for immigration appeals on the following parties:
 - Home Office
 - Do you feel there have been changes in the number of decisions the Home Office challenges at the Upper Tribunal stage? *[And First-tier/Court of Appeal if able to comment]*
 - Legal practitioners
 - Any other stakeholders

Mitigation of current and future impact of the Legal Aid reforms

6. Are you aware of any actions that have been put into place to mitigate against the (negative) impacts of removing Legal Aid on appellants at the Upper Tribunal?
7. Are you aware of any work being carried out to monitor the impact of the removal of Legal Aid for onward immigration appeals?
8. Is there anything that the Ministry of Justice should be doing to monitor the impact of the removal of Legal Aid for onward immigration appeals?