Title: Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal **IA No:** MoJ/064/2020 **RPC Reference No:** N/A **Lead department or agency:** Ministry of Justice (MoJ) **Other departments or agencies:** HM Courts & Tribunal Services (HMCTS)	**Impact Assessment (IA)** **Date:** November 2020 **Stage:** Consultation **Source of intervention:** Domestic **Type of measure:** Primary legislation **Contact for enquiries:** Vijay Parkash, Ministry of Justice telephone: 02033344471; email: **Vijay. Parkash @justice.gov.uk**

Summary: Intervention and Options

RPC Opinion: N/A

Cost of Preferred (or more likely) Option (in 2019 prices)			
Total Net Present Social Value (10 yr)	**Business Net Present Value**	**Net cost to business per year**	**Business Impact Target Status**
£1.9m- £2.7m	n/a	n/a	Not a regulatory provision

What is the problem under consideration? Why is government action or intervention necessary?

As part of the existing appeals process in both the civil courts and tribunals, there may be several reviews of the same case at different levels. This extends the time it takes to finally dispose of a case, and can be an inefficient use of judicial resource. The Government is also concerned that high case volumes in the tribunals and the Court of Appeal can cause significant delays in appeals being heard. These delays undermine confidence and damage the attractiveness of the United Kingdom as a venue for resolution of disputes of all kinds. The proposals are intended to improve the efficiency of the tribunal system by limiting the extent to which an unsuccessful litigant can require the Court of Appeal to further examine judicial decisions made in the Upper Tribunal. Government intervention is necessary as the proposals require primary legislation.

What are the policy objectives of the action or intervention and the intended effects?

The policy objective is to reduce the pressure on the Court of Appeal which is a precious resource. The proposals should ensure that resource is focused on the cases which most merit review at that level. The intended effect is to ensure that unmeritorious cases with little prospect of success are dealt with promptly in the lower courts, and that meritorious claims receive the necessary senior judicial scrutiny and are also brought swiftly to resolution. These proposals should ensure the right balance is struck between reducing the burden on the justice system, and upholding access to justice and the rule of law.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

This Impact Assessment (IA) compares the following Options against the base case of "do nothing" (Option 0):

- **Option 1:** In the case of a second appeal, if the Upper Tribunal refuses permission to appeal to the Court of Appeal, the losing party may only apply directly to the Court of Appeal for permission to appeal "for reasons of exceptional public interest". If the Upper Tribunal is uncertain whether to grant or refuse permission to appeal, they may refer the application for determination by the Court of Appeal (to be determined on the papers, unless the judge directs an oral hearing).
- **Option 2:** Where a judge of the Upper Tribunal has certified an application for judicial review to be totally without merit, there should be a right of review before another Upper Tribunal judge but no right to apply for permission to appeal to the Court of Appeal.
- **Option 3:** Implement Options 1 and 2 together.

Option 3 is the preferred option as it best meets the policy objectives.

Will the policy be reviewed? It will not be reviewed. **If applicable, set review date:** n/a

Does implementation go beyond minimum EU requirements?	No			
Is this measure likely to impact on international trade and investment?	No			
Are any of these organisations in scope?	**Micro** No	**Small** No	**Medium** No	**Large** No
What is the CO_2 equivalent change in greenhouse gas emissions? (Million tonnes CO_2 equivalent)	**Traded:** n/a	**Non-traded:** n/a		

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister Philp MP: ..... Date: 30/11/2020

Summary: Analysis & Evidence

Policy Option 1

Description: In the case of a second appeal, if the Upper Tribunal (UT) refuses permission to appeal to the Court of Appeal, the losing party may only apply directly to the Court of Appeal for permission to appeal "for reasons of exceptional public interest". If the Upper Tribunal is uncertain whether to grant or refuse permission to appeal, they may refer the application for determination by the Court of Appeal (to be determined on the papers, unless the judge requests an oral hearing).

FULL ECONOMIC ASSESSMENT

Price Base Year 2020	**PV Base Year** 2020	**Time Period Years** 10	**Net Benefit (Present Value (PV)) (£m)**		
			Low: optional	**High: optional**	**Best Estimate:** £2.1m to £2.8m

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate			£0.24m - £0.26m	£2.0m - £2.2m

Description and scale of key monetised costs by 'main affected groups'

There would be costs to HMCTS of between £0.24m-£0.26m per annum due to lost fee income in the Court of Appeal.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low				
High				
Best Estimate			£0.49m- £0.59m	£4.2m - £5.0m

Description and scale of key monetised benefits by 'main affected groups'

There would be savings of between £0.13m and £0.14m to the Legal Aid Agency (LAA) due to a reduction in legal aid funded cases.The would also be savings to HM Courts & Tribunals Service (HMCTS) from judicial time saved of between £0.36m- £0.45m per annum. The latter would be non-cashable although, in the long run, they could be made cashable by not hiring replacement Court of Appeal judges when current ones retire, given the remaining caseload. permits. Due to data not being recorded by HMCTS, we haver been unable to estimate the impact on parties with meritorious cases who would succeed under the current system but will have their appeal route closed off under the new proposal.

Other key non-monetised benefits by 'main affected groups'

This option would allow the Court of Appeal to focus only on cases of exceptional public importance. This would allow decisions in more important cases to be made more quickly and reduce the backlog of cases, so benefitting appellants**.**

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

To estimate the impact across the Upper Tribunal we have used flagged cases in the Immigration and Asylum Chamber (UT) with 'exceptional public importance'. These are recorded in monthly meeting as those with high media profiles and permissions to appeal which raise a significant point of law. We are aware this is not a perfect indicator and is likely to be a significant underestimate. As a result, we have modelled three scenarios in order to provide a ranged estimate. We also assume that for 10% of statutory second appeals in the Immigration and Asylum Chamber (UT), the decision on whether cases have exceptional public importance would be deferred to the Court of Appeal. Statistics being used are from 2019 and are the most up to date, we acknowledge that the number of cases falling within this category will change each year but assume that there would not be a large variance in these changes. When calculating the NPV, a 10% optimism bias has been applied to all impactswhich is standard practice in Impact Assessments (IA).

We assume legal professionals will find alternative work of a similar level of profitability.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:						**Score for Business Impact Target (qualifying provisions only) £m: N/A**
Costs:	N/A	**Benefits:**	N/A	**Net:**	N/A	

Summary: Analysis & Evidence

Policy Option 2

Description: Where a judge of the Upper Tribunal has certified an application for judicial review to be totally without merit, there should be a right of review before another Upper Tribunal judge but no right to apply for permission to appeal to the Court of Appeal.

FULL ECONOMIC ASSESSMENT

Price Base Year 2020	**PV Base Year** 2020	**Time Period Years** 10	**Net Benefit (Present Value (PV)) (£m)**		
			Low: optional	**High: optional**	**Best Estimate:** - £0.17m to - £0.21m

COSTS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Cost** (Present Value)
Low				
High				
Best Estimate			£0.04m – £0.05m	£0.33m - £0.39m

Description and scale of key monetised costs by 'main affected groups'

Monetised costs to HMCTS would arise through the fees lost in the Court of Appeal and in the extra judicial costs added to the Upper Tribunal. These are estimated to be between £0.04m and £0.05m per annum.

Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	**Total Transition** (Constant Price)	Years	**Average Annual** (excl. Transition) (Constant Price)	**Total Benefit** (Present Value)
Low				
High				
Best Estimate			£0.01m - £0.03m	£0.12m - £0.22m

Description and scale of key monetised benefits by 'main affected groups'

The monetised benefits of option 2 are estimated to be between £0.01m and £0.03m per annum. These would arise as a result of cases moving from the Court of Appeal to the Upper Tribunal where the cost of an Upper Tribunal judge is less than that of a Court of Appeal judge.

Other key non-monetised benefits by 'main affected groups'

There would be benefits to appellants as court fees in the Upper Tribunal are much lower than that of the Court of Appeal.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

To estimate the effects of reviewing totally without merit judicial reviews by a 2nd Upper Tribunal judge instead of in the Court of Appeal, we have run three scenarios in order to provide a ranged estimate. As part of the reforms all cases deemed to be totally without merit would be removed from the Court of Appeal.

Statistics being used are from 2019 and are the most up to date, we acknowledge that the number of cases falling within this category will change each year but assume that there would not be a large variance in these changes.

When calculating the NPV a 10% optimism bias has been applied to all impacts which is standard practice in IAs.

We assume legal professionals will find alternative work of a similar level of profitability.

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:						**Score for Business Impact Target (qualifying provisions only) £m: N/A**
Costs:	N/A	**Benefits:**	N/A	**Net:**	N/A	

Summary: Analysis & Evidence

Policy Option 3

Description: Implement Option 1 and Option 2 together.

FULL ECONOMIC ASSESSMENT

Price Base Year 2020	PV Base Year 2020	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: optional	**High: optional**	**Best Estimate:** £1.9m to £2.7m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low				
High				
Best Estimate			£0.28m - £0.30m	£2.4m - £2.6m

Description and scale of key monetised costs by 'main affected groups'

There would be monetised costs to HMCTS from the fees lost in the Court of Appeal and in the extra judicial costs to the Upper Tribunal. These are estimated to be between £0.28m and £0.30m per annum.

Other key non-monetised costs by 'main affected groups'

None

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			Optional	
High			Optional	
Best Estimate			£0.50m - £0.61m	£4.3m - £5.3m

Description and scale of key monetised benefits by 'main affected groups'

There would be an approximate saving of between £0.13m and £0.14m to the LAA due to a reduction in legal aid funded cases.The monetised net judicial time saving is estimated to be between £0.37m- £0.47m per annum. While this is largely a non-cashable saving but rather an efficiency saving**,** in the long run these time savings are equal to full time equilavent (FTE) savings which could be cashed by not hiring replacement Court of Appeal judges when current ones retire, given the remaining caseload permits.

Other key non-monetised benefits by 'main affected groups'

This option would allow the Court of Appeal to focus only on cases of exceptional public importance for permissions to appeal. This would allow decisions fin more important cases to be made quicker, so increasing the efficiency of the Court of Appeal and reducing the general backlog of cases**.** There would be benefits to appellants as court fees to appeal in the Upper Tribunal are much lower than that of the Court of Appeal.

Key assumptions/sensitivities/risks **Discount rate (%)** 3.5%

To estimate the cases in the Immigration and Asylum Chamber (UT) with 'exceptional public importance', we have used flagged cases. These are recorded in monthly meeting as those with high media profiles and permissions to appeal which raise a significant point of law. We are aware this is not a perfect indicator and is likely to be a significant underestimate. As a result, we have modelled three scenarios in order to provide a ranged estimate. We also assume that for 10% of statutory second appeals in the immigration and asylum chamber, the decision on whether cases have exceptional public importance would be deferred to the Court of Appeal. To estimate the effects of reviewing totally without merit permission to appeals by a 2nd upper tribunal judge instead of in the Court of Appeal, we have run three scenarios in order to provide a ranged estimate. As part of the reforms all cases deemed to be totally without merit would be removed from the Court of Appeal.

Statistics being used are from 2019 and are the most up to date, we acknowledge that the number of cases falling within this category will change each year but assume that there would not be a large variance in these changes.

When calculating the NPV, a 10% optimism bias has been applied to all impacts which is standard practice in IAs.

We assume legal professionals will find alternative work of a similar level of profitability.

BUSINESS ASSESSMENT (Option 3)

Direct impact on business (Equivalent Annual) £m:						Score for Business Impact Target (qualifying provisions only) £m: N/A
Costs:	N/A	**Benefits:**	N/A	**Net:**	N/A	

Evidence Base

A. Background

Introduction to the tribunal system

1. The First-tier Tribunal and Upper Tribunal were created by the Tribunals, Courts and Enforcement Act 2007 ('TCEA'). They are jointly referred to as the 'unified tribunal system' and replaced a large number of tribunals which had previously operated under a number of different statutory regimes. The First-tier Tribunal is divided into seven chambers: Social Entitlement Chamber, Health, Education and Social Care Chamber, War Pensions and Armed Forces Compensation Chamber, Immigration and Asylum Chamber, General Regulatory Chamber, Tax Chamber and Property Chamber, whilst the Upper Tribunal is divided into four chambers: Administrative Appeals Chamber, Tax and Chancery Chamber, Immigration and Asylum Chamber and Lands Chamber.

2. Decisions of the First-tier Tribunal can be appealed to the Upper Tribunal with the permission of either the First-tier Tribunal or (if the First-tier Tribunal refuses permission) the Upper Tribunal itself. The Upper Tribunal also considers some particular kinds of cases as the tribunal of first instance.

Judicial review in the Upper Tribunal

3. Judicial review is a process by which individuals, businesses and other affected parties can challenge the lawfulness of decisions or actions of Government, local authorities, and other public bodies. It is a critical check on the powers of the State, providing an effective mechanism for challenging the decisions of public bodies to ensure they are lawful.

4. Most kinds of judicial reviews are heard in the High Court but some, principally immigration and asylum cases as well as social welfare related benefit cases, are heard in the Upper Tribunal. There are three main grounds on which a decision or action can be challenged by way of judicial review:

    - Illegality – for example, the public body in question was acting beyond its statutory powers;
    - Irrationality – for example, the decision was not taken reasonably, or no reasonable person could have taken it;
    - Procedural Impropriety – for example, a failure to act in accordance with natural justice.

Judicial review permission procedure

5. Before a judicial review claim can be brought, the litigant must seek permission to do so. In assessing this, the court generally looks at whether the claim has been brought within the necessary time limit, whether the body being challenged is capable of being judicially reviewed, and whether the litigant has a sufficient interest to give them 'standing'. Once all of these elements have been met, the court must also be satisfied that the claim gives rise to an arguable case for judicial review to allow permission. Thereafter, a judicial review claim will proceed to a substantive hearing.

6. Applications to the Upper Tribunal for permission to apply for judicial review are usually initially considered on the papers. Cases which are refused permission on the papers are entitled to have the refusal reconsidered at an oral hearing, unless the application was certified as totally without merit at the time of the paper refusal, in which case there is no such entitlement.

Appeals (and permission to appeal applications) in the Court of Appeal

7. There are several different types of statutory appeals and judicial reviews which may be the subject of applications for permission to appeal to the Court of Appeal from the Upper Tribunal, but our proprosals for reform are i) Second appeals and ii) Refusals on papers by the Upper Tribunal to grant permission to apply for judicial review which are certified as being totally without merit.

Second Appeals

- Second appeals from the Upper Tribunal exercising its appellate jurisdiction from the First-tier Tribunal. Both the Upper Tribunal and the Court of Appeal apply the 'second appeals' test to these applications.
- The 'second appeals' test applied states that the proposed appeal must raise 'an important point of principle or practice'; or there must be some other compelling reason for the Court of Appeal to hear the appeal.
- In 2019, there were 561 applications for permission to appeal in statutory second appeals determined by the Court of Appeal from the Immigration and Asylum chamber.

Judicial Review

- Refusals on paper by the Upper Tribunal to grant permission to apply for judicial review which are certified as being totally without merit. There is then no right of oral renewal in the Upper Tribunal, but litigants are still able to apply for permission to appeal to the Court of Appeal.
- In 219, there were 118 cases deemed to be totally without merit, of these 67 were determined by the Court of Appeal and only 4% were granted.

8. Appeals to the Court of Appeal generally require permission. Permission to Appeal (PTA) can be granted by the Upper Tribunal or by the Court of Appeal itself. The party who wishes to appeal must first apply to the Upper Tribunal for PTA, and if this is refused, can then apply directly to the Court of Appeal. In an application for PTA following a statutory second appeal in the Upper Tribunal, the Upper Tribunal and Court of Appeal both apply the 'second appeals' test.

9. Where an application for PTA is made to the Court of Appeal the default position is that the application will be determined on paper, although the judge considering the application on paper may direct an oral hearing (and is obliged to do so if they are of the opinion that the application cannot be fairly determined without an oral hearing). Nevertheless, even PTAs determined on paper take considerable judicial time, due to the need to examine submissions, previous judgments and relevant case law.

10. Applications for permission for judicial review which are deemed totally without merit do not have a right of oral renewal in the Upper Tribunal but do have a right of appeal to the Court of Appeal.

11. The judicial review process already permits a claimant to make a paper application which, if refused (and not found totally without merit), can be followed up by an oral renewal which is usually heard by a different judge. If this oral renewal is refused, it can then be appealed to the Court of Appeal.

Problem Under Consideration

12. For judicial reviews for cases that are certified by the Upper Tribunal as totally without merit, the available data indicates that very few applications are overturned by the Court of Appeal and in the instances that a case proceeds to a hearing, relatively few cases are successful In 2019, out of the 67 totally without merit applications determined by the Court of Appeal, only 3 (4%) were granted permission, despite considerable judicial time being used to consider them. Furthermore, of those certified cases which were granted PTA, none succeeded at the substantive appeal stage.

13. In the case of a second appeal where permission is granted, the available data indicates that very few cases actually succeed at hearing. This suggests that the current test is not strict enough to prevent the misuse of the system by those who see an advantage in the delay caused by bringing hopeless challenges. In 2019, out of the 561 PTAs determined by the Court of Appeal by the Immigration and Asylum Chamber (UT) at the second appeals stage, 92 (16.4%) of these were granted. However, the numbers of cases that were granted permission and succeed at the substantive appeal stage was only 27 cases.

14. As part of the existing statutory appeals processes in both the civil courts and tribunals, there may be several considerations of the same case at different levels of the system. This extends the time it takes to finally dispose of a case. The Government is concerned about the considerable pressures

on the Court of Appeal's time resulting from the current arrangement for obtaining permission to appeal for statutory appeals and judicial review applications from the Upper Tribunal.

15. For example, In calendar year 2019 the Court of Appeal with regards to Immigration and Asylum Chamber (UT) cases took (on average) 6 months to dispose of a paper permission to appeal application; 18 months to dispose of an oral permission application; and 18 months to dispose of a full appeal. This is largely due to the high volume of work currently reaching the Court of Appeal. This has a knock-on effect on all other parts of the legal system, including civil claims. Therefore, delays in the Court of Appeal caused by numerous reconsiderations of PTA cases undermine the reputation of the United Kingdom as a venue for resolution of disputes of all kinds.

B. Rationale and Policy Objectives

Economic Rationale

16. The conventional economic approach to government intervention is based on efficiency and equity arguments. The Government may consider intervening if there are failures in the way markets operate (e.g. monopolies overcharging consumers) or there are failures with existing government interventions (e.g. waste generated by misdirected rules). The proposed new interventions should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and re-distributional reasons (e.g. to reallocate goods and services to groups in society in more need).

17. The Government wants a justice system that works for everyone. This means a justice system that balances efficiency on the one hand with fairness, access to justice and the rule of law on the other.

18. Therefore the primary rationale for the proposals assessed in this Impact Assessment (IA) is efficiency. Under the current system judges in the tribunals and the Court of Appeal can spend excessive time reviewing an individual case on the same grounds of appeal on multiple occasions, and in the majority of cases reaching the same decision.

Policy Objectives

19. The associated policy objectives are not to restrict access to justice, but rather to develop an even-handed response to the current pressures that the high volume of failed second appeals and judicial review PTA applications have placed on the Court of Appeal in recent times.

20. The Court of Appeal is a precious resource. These reforms are designed to ensure that resource is focused on the cases which most merit review at that level. Our proposals would ensure these judicial review claims receive the necessary senior judicial scrutiny they deserve in the Upper Tribunal by tribunal judges who are experts in the law of their jurisdiction. The processes and rules of the Upper Tribunal are designed to offer an accessible, effective and economic route which enable appellants whether individuals or businesses and whether represented or not, to make their case.

21. We also want to ensure that weak or meritless cases which stand little prospect of success are identified and dealt with promptly at an early stage in proceedings, and that legitimate claims are brought quickly and efficiently to a resolution. In this way, we would be able to ensure that the right balance is struck between reducing the burdens on public services and protecting access to justice and the rule of law.

C. Affected Stakeholder Groups, Organisations and Sectors

22. A list of the main groups and stakeholders who would be affected by the proposals described in this IA is shown below:

- Appellants in the unified tribunal system and the Court of Appeal;
- HM Courts and Tribunals Service (HMCTS) and the judiciary;
- The Legal Aid Agency (LAA);
- Providers of legal services.

D. Options Under Consideration

23. To address the policy objectives, the following options are assessed in this IA:

- **Option 0/Do Nothing**: The current process for seeking permission to appeal in the tribunals and Court of Appeal would remain unchanged.

- **Option 1:** In the case of a second appeal, if the Upper Tribunal refuses permission to appeal to the Court of Appeal, the losing party may only apply directly to the Court of Appeal for permission to appeal "for reasons of exceptional public interest". If the Upper Tribunal is uncertain whether to grant or refuse permission to appeal, they may refer the application for determination by the Court of Appeal (to be determined on the papers, unless the judge requests an oral hearing).

- **Option 2:** Where a judge of the Upper Tribunal has certified an application for judicial review to be totally without merit, there should be a right of review before another Upper Tribunal judge but no right to apply for permission to appeal to the Court of Appeal.

- **Option 3:** This would implement Options 1 and 2 together.

24. **Option 3** is the preferred option as it best meets the policy objectives.

Option 0: Base Case/Do nothing

25. Under the 'do nothing' or 'base case' the current process for seeking permission to appeal in the tribunals and Court of Appeal would remain unchanged.

26. Under this option there would be no increase in the efficiency of the courts and tribunals as the activities assessed in this IA would continue to be dealt with in the current fashion. Therefore, there would be no change in the current use of judicial resources.

Option 1: In the case of a second appeal, if the Upper Tribunal refuses permission to appeal to the Court of Appeal, the losing party may only apply directly to the Court of Appeal for permission to appeal "for reasons of exceptional public interest". If the Upper Tribunal is uncertain whether to grant or refuse permission to appeal, they may refer the application for determination by the Court of Appeal (to be determined on the papers, unless the judge requests an oral hearing).

27. This option would narrow the test to make a PTA application to the Court of Appeal in second appeals from the Upper Tribunal. Appellants in these cases would only be able to make an application to appeal to the Court of Appeal by applying a test for "reasons of exceptional public interest". If the Upper Tribunal is uncertain whether to grant or refuse a PTA, they may refer the application for determination by the Court of Appeal (which will be determined in the usual way on the papers, unless the judge has requested an oral hearing).

28. Overall it has been assumed that the volume of permission to appeal applications made to the Court of Appeal would diminish under this option.

Option 2: Where a judge of the Upper Tribunal has certified an application for judicial review to be totally without merit, there should be a right of review before another Upper Tribunal judge but no right to apply for permission to appeal to the Court of Appeal.

29. This option would remove the right to apply to the Court of Appeal for PTA where the Upper Tribunal has certified a judicial review paper permission application as totally without merit. A right of renewal on the papers in front of a second Upper Tribunal judge would be provided instead. This would make the second review of a case that one judge has certified as totally without merit a task to be carried out by another independent first instance judge, rather than by a Court of Appeal judge. There would only be an appeal to the Court of Appeal if the Upper Tribunal granted PTA.

30. Overall it has been assumed that the volume of permission to appeal applications made to the Court of Appeal would diminish under this option. The right of renewal on the papers for judicial review permission applications certified as totally without merit by the Upper Tribunal would, however, result in modest additional work for the Upper Tribunal.

Option 3: Implement options 1 and 2 together.

31. Under option 3, both options 1 and 2 would be implemented. This would mean that the second appeals test would be changed to only allow applications for a PTA to the Court of Appeal for cases of 'exceptional public importance' or in cases where UT has referred a PTA decision on which it is uncertain. In addition, totally without merit judicial reviews would have the right to be reviewed before another Upper Tribunal judge instead of in the Court of Appeal.

32. This option would reduce pressure on the Court of Appeal so increasing efficiency and reducing the backlog of cases.

E. Cost and Benefit Analysis

33. This Impact Assessment (IA) follows the procedures and criteria set out in the IA Guidance and is consistent with the HM Treasury Green Book.

34. Where possible, this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the options under consideration. The costs and benefits of each option are compared to option 0, the do nothing or 'baseline' case. As the 'baseline' option is compared to itself, the costs and benefits are necessarily zero, as it its Net Present Value (NPV).

35. The IA guidance places a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, positive or negative. Impacts in this IA are therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are non-monetisable.

Methodology

36. The analysis which follows is based on the following:

- We have used caseload data for 2019 as this is the most recent year available;
- Monetised impacts are given in 2020 prices;
- The NPV has been calculated using a 10 year appraisal period;
- Optimism bias of 10 per cent has been applied to all impacts.

37. To estimate the impact of option 1, we have used an indicator of 'Flagged cases' to represent those PTAs in the immigration and asylum chamber with 'exceptional public importance'. This measure is not entirely accurate as we have no way of knowing how many cases will be classed as having 'exceptional public importance' and expect the figure to be an underestimate. As a result, we have run different scenarios to account for this, based on discussions held with those who work within the Court of Appeal. These scenarios use 'Flagged cases' plus 50% extra cases, 'Flagged cases' plus

100% extra and 'Flagged cases' plus 200% extra. We have also assumed that for 10% of statutory second appeals in the immigration and asylum chamber, the decision on whether cases have exceptional public importance would be deferred to the Court of Appeal.

38. Under option 2, we have assumed that the Upper Tribunal will take all the workload that originally persisted in the Court of Appeal. This assumption may have some risks if workload in the Upper Tribunal differs to that in the Court of Appeal i.e. if more people choose to appeal as a result of this change, because the fees cost to appeal to the Upper Tribunal compared to the Court of Appeal are much lower. Again, we have run scenarios to account for this.

39. Under options 1-3 legal services providers may experience reduced levels of business from any reduction in the volume of statutory appeals and judicial reviews, or from judicial reviews being withdrawn earlier in the process (such as before an oral renewal is made in respect of option 2). As in previous court reforms, it is anticipated legal professionals will diversify into other areas of a similar or next highest level of profitability because resources would be freed up for other activities.

Option 1: In the case of a second appeal, if the Upper Tribunal refuses permission to appeal to the Court of Appeal, the losing party may only apply directly to the Court of Appeal for permission to appeal "for reasons of exceptional public interest". If the Upper Tribunal is uncertain whether to grant or refuse permission to appeal, they may refer the application for determination by the Court of Appeal (to be determined on the papers, unless the judge requests an oral hearing).

Costs of Option 1

40. The monetised costs of option 1 would arise through a reduced Court of Appeal fees. It is estimated that this option would result in a reduction of between 480 and 506 PTA's per year which, after taking into account fee remissions, would reduce fee income by between £0.24m-£0.26m per annum.

Benefits of Option 1

41. The monetised benefits of option 1 are estimated to be between £0.49m and £0.59m per year. This would arise because Court of Appeal fees are set at below the costs of providing the sevice and through savings to the LAA.

42. The benefits to HMCTS would arise through a reduction across all jurisdictions of between 480 and 506 cases per annum. The monetised net judicial time saved from this is £0.36m- £0.45m per annum. This time saving would be non-cashable but in the longer term could become one if were used to not hire new judges to replace ones who retire. This option is currently equivalent to 1 FTE.

43. There would be an estimated saving of between £0.13m-£0.14m to the LAA due to a reduction in legal aid funded cases.

44. This option would allow the Court of Appeal to focus only on cases of exceptional public importance. This would allow decisions in more important cases to be made quicker and could help reduce the backlog of cases, This would benefit appellants as important decisions would be taken quicker by the justice system which may impact other areas of law**.** It is not possible to monetise this benefit.

Option 2: Where a judge of the Upper Tribunal has certified an application for judicial review to be totally without merit, there should be a right of review before another Upper Tribunal judge but no right to apply for permission to appeal to the Court of Appeal.

Costs of Option 2

45. This option is estimated to reduce the number of cases in the Court of Appeal by 118. Monetised costs would arise through the fees lost in the Court of Appeal and in the extra judicial costs added to the Upper Tribunal. These are estimated to be between £0.04m and £0.05m per annum.

Benefits of Option 2

46. The monetised benefits of option 2 are estimated to be between £0.01m and £0.03m per annum. These would arise as a result of cases moving from the Court of Appeal to the Upper Tribunal where the cost of an Upper Tribunal judge is less than that of a Court of Appeal judge.

47. There would be a benefit to appellants of having a second appeal in the Upper Tribunal compared to appealing to the Court of Appeal in the form of lower court fees.

Option 3: Implement options 1 and 2 together.

Costs of Option 3

48. The monetised costs of option 3 would arise through the fees lost in the Court of Appeal and in the extra judicial costs to the Upper Tribunal. These are estimated to be between £0.28m and £0.30m per annum.

Benefits of Option 3

49. The monetised benefits of option 3 are estimated to be between £0.50m and £0.61m per annum.

50. The benefits to HMCTS would arise through a reduction in the number of Court of Appeal cases across all jurisdictions of between 598 and 624 cases per annum**.** The monetised net judicial time saved from this is estimated to be between £0.37m- £0.47m per annum. This saving would be non-cashable but in the longer term could become one if it were used to not hire new judges to replace ones who retire. This option is currently equivalent to 1 FTE.

51. There would be an approximate saving of between £0.13m and £0.14m to the LAA due to a reduction in legal aid funded cases.

52. This option would also allow the Court of Appeal to focus only on cases of exceptional public importance for permissions to appeal. This would allow decisions in more important cases to be made more quickly, so increasing efficiency in the Court of Appeal and reduceing the general backlog of cases**.** It has not been possible to monestise this benefit.

53. There would be a benefit to appellants of having a second appeal in the Upper Tribunal compared to appealing to the Court of Appeal in the form of lower court fees.

Summary & Preferred Option

54. Table 1 below provides a summary of the impacts of each of the three options described above.

Table 1: Impacts Summary Table

	Option 1	Option 2	Option 3
Costs (yearly)	£0.24m - £0.26m	£0.04m - £0.05m	£0.28m - £0.30m
Benefits (yearly)	£0.49m - £0.59m	£0.01m - £0.03m	£0.50m - £0.61m
Total (yearly)	£0.25m - £0.33m	(-£0.02m) - (-£0.024)m	£0.23m - £0.31m
FTE saving (yearly)	1 FTE	0 FTE	1 FTE
Estimated CoA cases removed (yearly)	480 – 506 cases	118 cases	598 – 624 cases
NPV (10 year)	**£2.1m - £2.8m**	**(-£0.17m) – (-£0.2m)**	**£1.9m - £2.7m**

Due to rounding some of the figures in table may not perfectly appear to add up. This table is a summary of the points explained above in the cost benefit analysis section. The FTE savings is based on yearly sitting days saved. The preferred option 3 is highlighted in orange.

55. The preferred option is option 3. This is because option 3 would offer the highest efficiency gains for the Court of Appeal with regards to the removal of cases that would otherwise be unsuccessful.

56. Option 3 also best aligns with our objective to ensure that weak or meritless cases which stand little prospect of success are identified and dealt with promptly at an early stage in proceedings, and that legitimate claims are brought quickly and efficiently to a resolution. This would reduce the burden placed upon the Court of Appeal, who's time may become more scarce as they deal with cases relating to EU Exit issues, and would ensure that the right balance is struck between reducing the burdens on public services and protecting access to justice and the rule of law.

F. Assumptions, Risks & Sensitivity Analysis

57. The main assumption used in the analysis, and the associated risks, are stated in section E above.

58. We have used 2019 data in our analysis as this is the most up to date data available. However, each year will be slightly different and there is no way of estimating exactly how different this would be as there are not predictable patterns that exist with regards to demand within the justice system. However, based on trends in other court jurisdictions and excluding the occurrence of an exogenous shock such an occurrence of a global pandemic, we expect this variance to be very small. These slight discrepancies may pose a small risk to the accuracy of our analysis.

59. When considering the time taken to process permissions to appeal, we have assumed that it takes the same length of time in the Upper Tribunal as in the Court of Appeal for appeals of the same type. This assumption is made due to limited readily available recorded data. It is likely that cases have a similar processing time but this may be an overestimate if the Court of Appeal takes longer to process permissions to appeal than the Upper Tribunal.

60. We assume legal professionals will find alternative work of a similar level of profitability. If this is not the case, there may be negative impacts on the providers of such services. However, as noted above, the Government believes such losses would be a function of inefficient court processes and, as such, would not constitute a reduction in overall social welfare.

61. Some of the work carried out by legal professionals is the result of inefficient court processes, so there are no gains to society from so doing. This streamlining process would therefore increase efficiency thus leading to gains in overall social welfare.

62. We have chosen not to run a sensitivity analysis and instead have opted to run three scenarios under each option to overcome any potential inaccuracies in estimates and provide ranged estimates rather than a single figure for each option. Option 1 is based on scenarios to estimate the number of cases of significant importance and option 2 has point estimates about the percentage of totally without merit cases further appealed.

G. Wider Impacts

Equalities

63. The Equality Statements for each of the measures described in this IA consider the wider impact of the proposals in light of the MoJ's duties under the Public Sector Equality Duty. The following paragraphs provide our overall conclusions

64. Under the Equality Act 2010 public authorities have an ongoing duty to have due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations between those with different 'protected characteristics'. The nine protected characteristics are race, sex, disability, sexual orientation, religion and belief, marriage and civil partnership, gender reassignment, pregnancy and maternity. As part of this obligation, we have made an initial assessment of the impact of our proposals.

Direct Discrimination

65. We hold the view that none of the proposals in this IA are likely to be directly discriminatory within the meaning of the Equality Act 2010 as they apply equally to all appellants and applicants applying for permission to appeal to the Upper Tribunal or Court of Appeal in the case types affected. We do not

consider that the proposals would result in anyone being treated less favourably as a result of any protected characteristic.

Indirect Discrimination

66. We recognise that some appellants and applicants with protected characteristics are likely to be over represented when compared to the general population. The majority of PTA applications in the Court of Appeal relate to immigration and asylum matters. It is therefore reasonable to anticipate that our proposals may have a differential (adverse) impact on the characteristic of race and also, perhaps, religion/belief. In addition, the highest volume tribunal jurisdiction affected by the reforms will be Social Security and Child Support, and it is therefore reasonable to expect a differential (adverse) impact on the characteristic of disability.

67. We consider that any such impact is justified on the basis that there is a good case for the proposed reforms and that, as now, at any stage in the revised appeal process there will be equality in the approach adopted by tribunal or court, regardless of any protected characteristic an appellant may have.

68. We acknowledge however that we do not collect comprehensive information about court and tribunal users generally, and specifically those involved in proceedings in the Court of Appeal, in relation to protected characteristics. This limits our understanding of the potential equality impacts of the proposals for reform. To help the Government fulfil its duties under the Equality Act 2010 we would welcome information and views to help us gain a better understanding of the potential equality impacts that our proposals may have.

Discrimination arising from disability and duty to make reasonable adjustments

69. We recognise that it remains important to continue to make reasonable adjustments for courts and tribunals users, court staff and the judiciary with disabilities, to help ensure that appropriate support is given to enable fair access to justice.

Advancing equality of opportunity

70. We have considered this limb of the duty and our overall assessment is that there are some proposals in the consultation paper that are likely to advance equality of opportunity for appellants with protected characteristics.

Fostering good relations

71. We consider it unlikey that there would be any impact on fostering good relations as a result of these proposals.

Welsh language

72. We have considered the implications for Welsh language in the development of these proposals.

Business Impact Target

73. The proposal is not considered to be a qualifying regulatory provision under the Small Business Enterprise and Employment Act 2015 and is therefore not in scope of the Business Impact Target.

74. Small and micro businesses might experience a reduction of business from any reduction in the volume of statutory appeals and judicial reviews, or from judicial reviews being withdrawn earlier in the process. There is no clear evidence that small and micro businesses would be affected differentially compared to other legal services providers from any reduction in business.

75. Small and micro businesses might respond to this impact by allocating resources freed from less statutory appeal and judicial review activity to other profitable activities. There is no clear evidence that small and micro businesses in general are less able to adjust to changing patterns of business demand compared to other legal services providers.

International Trade

76. There could be wider economic gains in international trade if the reform policies are implemented for the UK economy as the Court of Appeal becoming a more attractive venue for international dispute resolution in judicial matters.

Environmental Impacts

77. We expect there to be no environmental impacts as a result of the options within this Impact Assessment.

H. Monitoring and Evaluation

78. As this is a consultation stage IA, the data that will need to be collected in the future are the responses and feedback to the points raised in this document which may contain statistical data presented by the respondents replying to the consultation. This shall be completed via the process described in the consultation documentation. No further analysis will be undertaken if the Government selects to implement the preferred option as consulted.