EXPLANATORY MEMORANDUM TO THE ASYLUM AND IMMIGRATION TRIBUNAL (PROCEDURE) (AMENDMENT) RULES 2007

2007 No 835

1. This explanatory memorandum has been prepared by the Tribunals Service of the Department for Constitutional Affairs and is laid before Parliament by Command of her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Description

2.1 This instrument ("the 2007 Amendment Rules") amends rule 19 and rule 62(7) of SI/2005/230; the Asylum and Immigration Tribunal (Procedure) Rules 2005 ("the 2005 Rules"), which prescribe the procedure to be followed for appeals and applications to the Asylum and Immigration Tribunal ("the AIT"). These are amendments in response to two recent Court of Appeal judgments:

- *FP (Iran) and MB (Libya) v. Secretary of State for the Home Department ("SSHD")* [2007] EWCA Civ 13, which declared the existing Rule 19 to be unlawful in certain circumstances; and
- *AM (Serbia), MA (Pakistan) and MA (Sudan) v. SSHD*, [2007] EWCA Civ 16 which declared the existing Rule 62(7) irrational.

2.2 The 2007 Amendment Rules are subject to negative resolution, and are to come into force on 10th April 2007.

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

3.1 None.

4. Legislative Background

4.1 The Procedure Rules for the AIT are made by the Lord Chancellor under sections 106(1) to 106(3), 112(2) and 112(3) of the Nationality, Immigration and Asylum Act 2002 ("the NIA Act 2002").

4.2 Under s.106 of the NIA Act 2002, the Lord Chancellor may make rules regulating the exercise of the right of appeal under s.82 of the same Act, and prescribing the procedure to be followed. The Lord Chancellor must ensure the rules are designed in such a way that proceedings before the Tribunal are handled as fairly, quickly and efficiently as possible. This is reflected in rule 4 of the 2005 Rules, which sets the Overriding Objective of the Rules.

Rule 19 of the 2005 Rules

4.3 S.106(2)(e) states that the Rules may enable or require the Tribunal to determine an appeal in the absence of parties in specified circumstances.

4.5 Under the existing rule 19 of the 2005 Rules, the Tribunal is under a duty to hear an appeal in the absence of a party or his representative, where it is satisfied that the party or his representative has been given notice of the date, time and place of the hearing, and has given no satisfactory explanation for his absence. The explanation for the absence has to be given by the party or the representative.

4.6 The Court of Appeal judgment in *FP (Iran) and MB (Libya) v. SSHD* declared the mandatory nature of rule 19 unlawful in that it went against the requirement in s.106 of the NIA Act 2002 that the rules ensure fairness as well as speed.

Rule 62(7) of the 2005 Rules

4.7 The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 abolished the two-tier appellate structure of immigration adjudicator and Immigration Appeal Tribunal ("IAT") and replaced it with the single tier AIT, which came into being on 4th April 2005.

4.8 Transitional provisions were enacted for cases in which an adjudicator had made a decision and the IAT had given leave to appeal before 4th April 2005, but the IAT had not heard the substantive appeal before it ceased to exist. Article 4 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Commencement No.5 and Transitional Provisions) Order 2005 provided that pending IAT appeals would become AIT appeals. Article 5(2) then provides that the AIT would deal with the appeal in the same manner as if it had originally decided the appeal and it was reconsidering its decision.

4.9 Transitional provisions are contained in rule 62 of the 2005 Rules. Rule 62(7) provides that "the reconsideration shall be limited to the grounds upon which the Immigration Appeal Tribunal granted permission to appeal". The AIT therefore has no power to permit an applicant to amend his grounds of appeal, either by renewing grounds for which permission was expressly refused by the IAT or by the addition of new grounds. The forum for enlarging grounds of appeal had been to apply to the High Court for statutory review of the permission decision. Prior to 4th April 2005, it would have been possible for each appellant to apply to vary his grounds of appeal before the IAT pursuant to Rule 20 of the Immigration and Asylum (Procedure) Rules 2003.

4.10 The Court of Appeal in *AM (Serbia), MA (Pakistan) and MA (Sudan) v. SSHD* has declared rule 62(7) irrational because it precludes the AIT from considering potentially meritorious points of law, for which the IAT, when granting permission on other grounds, either refused, or was not asked to grant, permission.

5. Extent

5.1 This instrument applies to all of the United Kingdom.

6. European Convention of Human Rights

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

7. Policy background

Rule 19 of the 2005 Rules

7.1 The intention of rule 2 of the 2007 Amendment Rules is to remove the rigidity of rule 19. The first change, rule 2(a) of the 2007 Amendment Rules, provides the AIT with a discretion to proceed in a party's absence, rather than a duty to do so. The Tribunal may determine an appeal in the absence of a party or his representative if it is satisfied that the party or his representative has been given notice of the date, time and place of the hearing and that there is no good reason for the absence.

7.2 The second change, in rule 2(b), (c) and (d) of the 2007 Amendment Rules, is that the reason for the absence will no longer need to emanate from the party or his representative. This will enable the AIT to be informed by the Home Office Presenting Officer, or others, of likely explanations for a party's absence. It will also allow the AIT to draw inferences about the reason for non-attendance from its own knowledge or inquiries – for example, particular problems with the transport system; being informed by the Presenting Officer that the address to which Notice of Hearing was sent was not up-to-date; inferring that the absent party may have made a mistake about the date of hearing.

7.3 The amendments allow the AIT to retain the discretion to proceed where there is no good reason for the party's absence. This flexibility ensures that the rules are fair, whilst recognising that the appeals process must not be subject to abuse and procedural delays.

Rule 62(7) of the 2005 Rules

7.4 Rule 3 of the 2007 Amendment Rules amends rule 62(7) of the 2005 Rules to provide the AIT with the flexibility to permit a party to amend his grounds of appeal in a reconsideration pertaining to a transitional *(see paragraphs 4.8 and 4.9)* case. This amendment meets the concerns expressed by the Court of Appeal in *AM(Serbia) etc v SSHD*.

Consultation

7.5 In accordance with section 8 of the Tribunals and Inquiries Act 1992, the Department has consulted the Council on Tribunals on this amendment to the 2005 Rules. The Council welcomes the amendments. No further consultation

has been undertaken, on the basis that the proposed amendments respond directly to two Court of Appeal judgments. The changes are unlikely to be contentious, and do not extend beyond the operation of rules 19 and 62(7). The level of public interest is likely to be low. The Department therefore considers that, in light of Court of Appeal judgments and the need to meet the concerns expressed by the Court, further consultation is not necessary.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on businesses, charities or voluntary bodies.

9. Contact

9.1 Rachel Haynes at the Tribunals Service can be contacted with queries regarding the instrument, via the AIT switchboard on 0845 600 0877, or at Rachel.Haynes2@tribunals.gsi.gov.uk.