This note is to follow up on a point about asylum decision-making which the Convenor of the European and External Affairs Committee asked me to expand.

I can see the reasoning behind a separate Scottish Asylum Service, which is able to deploy specialist skills, and which is also able to learn and build on the experience of initiatives such as the Aberlour Trust and Scottish Refugee Council’s Guardianship service for unaccompanied minors, but as I mentioned on Thursday, the main issue with asylum decision making is how it is delivered, rather than the structure used. Whilst a commitment to getting it right first time must be correct, no system is infallible. Errors creep in, situations are difficult to assess, people find processes difficult to engage with, or feel silenced by them. Interpreters get things wrong. All of these things happen even with goodwill on all sides, and decisions will still be disputed.

This note relates to appeals against the decisions taken by the Scottish Asylum Service, if it should be decided, in the event of a Yes vote, that this body should replace the Home Office and assume responsibility for determining asylum claims. In brief, my view is that at the appeals stage, access to a tribunal chamber which includes both immigration and asylum in its remit, and which is part of a wider overarching administrative justice scheme, would provide an equal and fair structure.

Currently, Home Office decisions can be appealed to a First Tier Tribunal, followed by onward appeal (on restricted grounds) to an Upper Tribunal. What does the Scottish Government propose in relation to appeals? Does it intend to include an Immigration and Asylum Chamber as part of the Scottish Tribunals Service in due course?

This might appear to be too detailed an issue to be resolved now. Perhaps other priorities are more important. However, I raise it now because immigration and asylum decision making and appeals have such a troubled history. Appeals structures have changed (from two tier to one tier and back to two again in the past decade). Access to them has been restricted in controversial ways, for example, by removing rights of appeal for clearly unfounded cases, or where a claim should have been made earlier, or in a transit country. (For an account of the current appeals structure see S Craig and M Fletcher “The Supervision of Immigration and Asylum Appeals in the UK: Taking Stock” International Journal of Refugee Law IJRL (2012) Vol.24 No.1 pp60-84).

Many commentators and stakeholders are preoccupied with asylum seekers’ overuse of the higher courts. To the extent that this preoccupation is justified, it can be argued that, in too many cases, people resort to judicial review because access to an appeal tribunal is not available. The Immigration Act 2014 looks set to increase this problem, since it will restrict access to immigration appeals very significantly, with the result that judicial review will provide the only real remedy in immigration
cases too. This is like using a sledgehammer to crack a nut. As well as being an inappropriate remedy, judicial review also contributes to the delayed resolution of cases, and is costly and therefore inaccessible to most people.

Properly resourced, tribunals can resolve cases more quickly and efficiently than the higher courts can. They also act as a buffer, dealing with routine factual disputes, and leaving more complex legal questions to be resolved elsewhere. (See e.g. S Craig “Judicial Review: How much is too much? a view of Eba, Cart and MR (Pakistan) from the Asylum and Immigration perspective” Edinburgh Law Review 16.2. (2012): 210-223).

As I understand it, the Tribunals (Scotland) Act 2014 reflects the two tier structure of the reserved tribunals, and could include an immigration and asylum chamber. Inclusion would also be in line with the commitment, following the recent Scottish Civil Courts Review (2009), to shifting business away from the Court of Session and towards lower courts and tribunals. In the Q and A section(Qs 405-408), and in Chapter 10, the White Paper “Scotland’s Future” says that the Scottish Tribunals Service would take over responsibility for appeal tribunals dealing with some reserved matters. However, the White Paper is silent on whether or not there will be an Immigration and Asylum Chamber. I think serious consideration should be given to including such a chamber, for the reasons set out above.

Please thank Christina McKelvie MSP for giving me the opportunity to expand on the point I made on Thursday. Please also note that this is my personal view, rather than a collective GRAMnet view.

Sarah Craig
Lecturer in Public Law
University of Glasgow
Co-Convenor, GRAMNet
Glasgow Refugee Asylum and Migration Network