

First-tier and Upper Tribunal Rules

Implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007

Response to consultation on the Immigration and Asylum Appeals in the Upper Tribunal Rules.

(7 July 2009 – 29 September 2009)

Response from the Tribunal Procedure Committee

May 2010

Foreword by the Right Honourable Lord Justice Patrick Elias

The Tribunal Procedure Committee (“the TPC”) is charged with formulating procedural rules for tribunals which have become, or are becoming, part of the new structure created by the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). The members of the TPC have between them a broad and diverse knowledge of the practical operation of the Tribunal system.

The TPC has been guided by the following principles: to make the rules as simple and streamlined as possible; to avoid unnecessarily technical language; to enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and to adopt common rules across tribunals wherever possible, so that rules specific to a chamber or a tribunal are permitted only where there is a clear and demonstrated need for them.

Inevitably experience will demonstrate difficulties with the operation of the rules, or gaps in their coverage. However, the TPC’s remit is to keep rules under review, and periodic amendments can be made to try to ensure that the rules work as smoothly and fairly as possible.

Consultation is a fundamental part of the rule making process. Those involved in the day to day work of particular tribunals are often best placed to assess the potential impact of rule changes. We have benefited considerably from the responses to our consultations; they have helped eradicate errors, identify problems in the initial drafts, and suggested improvements. The TPC is extremely grateful to all who have taken the trouble to respond to the consultation documents. Even where proposed amendments have not been adopted, they have frequently generated important debates in the TPC which have helped sharpen the drafting process.

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Introduction

This document is the post-consultation report for the consultation that led to:

- The Tribunal Procedure (Amendment No. 2) Rules 2010

Background

The 2007 Act provides, in section 22 and Schedule 5, for a TPC. This committee, chaired by Lord Justice Elias, was established on 19 May 2008 with the function of making and amending Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

The intention behind the chamber rules is to create a single set of rules that can apply to all jurisdictions within a chamber rather than have several sets of rules applying. It is intended that the rules should be simple and easy to follow and should not include provisions that contain unnecessary requirements or repeat requirements contained elsewhere.

It was not intended to radically overhaul the existing processes within tribunals through these rules. The aim is to put all the rules in one place and reflect existing processes as far as possible. In some instances there is a need for specific provisions to apply or disapply to one or more jurisdictions, as indicated in these rules, but for the most part the intention is that the provisions should apply to all jurisdictions and be expressed in the same manner so that the rules meet the overriding objective, to deal with cases fairly and justly, in a consistent manner across all jurisdictions.

Once the chamber is established the TPC will have an ongoing role in reviewing the rules and processes that lie behind them and bringing forward proposals where it is considered that changes to the procedure rules would improve existing processes for the benefit of users.

It should be noted that the TPC only looked at subsuming the existing immigration and asylum processes into the Upper Tribunal Procedure Rules, and that the current First-tier Tribunal Procedure Rules for immigration and asylum are still in the format prior to the cessation of the Asylum and Immigration Tribunal. This is because the 2007 Act provides for the Lord Chancellor to transfer current tribunal procedure rules into the unified structure, with appropriate modifications only, so that they have effect as if they were Tribunal Procedure Rules made by the TPC. The

Government therefore arranged for the Asylum and Immigration Tribunal (Procedure) Rules 2005 to be transferred, with appropriate modifications, so to become Procedure Rules for the First-tier Tribunal (Immigration and Asylum Chamber). The TPC will be looking at reviewing and amending the Asylum and Immigration Tribunal (Procedure) Rules 2005 in due course to bring them in line with other First-tier Tribunal Procedure Rules.

The Consultation Process

Peter Lane, then a Senior Immigration Judge, and now an Upper Tribunal Judge, joined the TPC to assist with consideration of Rules needed for immigration and asylum cases in the Upper Tribunal. Ministry of Justice lawyers, under the guidance of the TPC, drafted amendments to the rules in readiness for public consultation. In addition, sub-committee meetings were held to consider the necessary rule changes in further detail. The consultation period began on 7 July 2009.

The consultation pack contained the consultation questions; and the draft Upper Tribunal Procedure Rule amendments (with a consolidated version). Included for information and completeness was the draft Asylum and Immigration Tribunal (Procedure) and (Fast track Procedure) Rules 2005 for the First-tier Tribunal (Immigration and Asylum Chamber) (with consolidated versions); and draft Practice Directions and Statements.

Stakeholder events to support the consultation took place in Manchester, Glasgow and London at the beginning of August 2009, and were attended by a total of 84 stakeholders. 10 responses to the consultation were subsequently received. The consultation closed on 29 September 2009.

There were 9 specific questions asked in this consultation, which also sought general opinions about the draft rule amendments.

Question 1

Are the general powers and provisions sufficient for the immigration and asylum appeals?

Response

The majority of respondents agreed that the general powers as set out in the consultation document were sufficient for immigration and asylum jurisdiction of the First-tier Tribunal and Upper Tribunal.

Conclusion

Following comments from respondents on Rule 11 of the Upper Tribunal Procedure Rules, the TPC amended this rule to clarify (in line with Rule 48 of the Asylum and Immigration (Procedure) Rules 2005 for the First-tier Tribunal (Immigration and Asylum Chamber)), that only persons who are not prohibited pursuant to section 84 of the Immigration and Asylum Act 1999 may provide immigration representation.

Whilst not related to the comments made by respondents, the TPC made a further amendment to the proposed draft Upper Tribunal Procedure Rule 25 to clarify that the appellant's reply (to any response to their notice of appeal to the Upper Tribunal) should be provided no later than five working days before an Upper Tribunal hearing. For appellants in the detained fast-track process, any reply to a response must be provided no later than the day before the Upper Tribunal hearing.

Question 2

Are any additional rules required?

Response

No specific additional rules were identified by respondents.

Conclusion

Although no additional rules were requested by respondents, the TPC took time to examine the Procedure Rules for the First-tier Tribunal (as amended by the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (“the Transfer Order”)) to ensure there was coherent and, where possible, consistent inter-relation with the Upper Tribunal Procedure Rules. As a result of that, the TPC made further amendments to the Asylum and Immigration Tribunal (Procedure) Rules 2005, and the Asylum and Immigration Tribunal (Fast-track Procedure) Rules 2005 (“the 2005 Rules” and “the Fast-track Rules”) in the Tribunal Procedure (Amendment No. 2) Rules 2010. Those amendments (a) clarify Rule 24 of the First-tier Tribunal Procedure Rules, which provides for deemed service and respective time-limits for applying for permission to appeal from the First-tier Tribunal to the Upper Tribunal; (b) clarify Rule 25(4), which provides for how a decision on permission to appeal to the Upper Tribunal will be promulgated by the First-tier Tribunal (subject to the special service provisions for asylum appellants, at 2005 Rule 27); and (c) amend the Fast-track Rule provisions (at Rule 17(2)) to ensure that the Tribunal’s capacity to process late applications for permission to appeal to the First-tier Tribunal for fast-track appellants is consistent with the principal 2005 Rules (at Rule 24(4)).

Question 3

Is the exclusion of immigration and asylum appeals from rule 7(2)(d) and Rule 8, except 8(2), an appropriate one?

Response

All respondents agreed that the exclusion of immigration and asylum appeals from rule 7(2) (d) and rule 8, except 8(2), was appropriate.

Conclusion

The Upper Tribunal Procedure Rules currently in force reflect the responses to the consultation on this issue.

Question 4

Do respondents agree that a permission application granted by the First-tier Tribunal should be treated as notice of appeal by the Upper Tribunal?

Response

All respondents agreed that it was practical and economic for a permission application granted by the First-tier Tribunal to stand as a notice of appeal to the Upper Tribunal.

Conclusion

The First-tier Tribunal and Upper Tribunal Procedure Rules in force from 15 February 2010 accordingly reflect the responses to the consultation on this issue.

Question 5

Do respondents agree that bail applications should be made to either, but not both, the First-tier Tribunal and Upper Tribunal where permission to appeal can be sought from the Upper Tribunal?

Response

All agreed with this proposal, although one respondent requested clarification that a detained appellant would not be penalised if they applied to the wrong chamber.

Conclusion

The Transfer Order, at the time of consultation, did not provide for bail applications to be made to the Upper Tribunal therefore the TPC took no action in relation to responses on this question. It is noted, however, that Upper Tribunal Judges have the capacity to sit in the First-tier Tribunal, pursuant to section 4(1)(c) of the 2007 Act. As such Upper Tribunal Judges will be able to hear bail applications in any event. This is likely to happen where bail applications are made in cases where substantive appeals are before the Upper Tribunal.

Question 6

Views are sought on the process for applying for permission to appeal to the Court of Appeal/Inner House of the Court of Session and the powers of the Tribunal in relation to applications made under the provisions of Part 7 of the rules?

Response

Respondents had strong and detailed views about this subject. One respondent queried the fact that there was apparently differing time-limits present in Upper Tribunal Procedure Rule 21(1) and 2005 Rule 26(1) (as it was in the version circulated, but is now 2005 Rule 24(2) and (3)). In relation to this, respondents raised concerns about the inconsistency of the way time was calculated for applications for permission to appeal to the Upper Tribunal, i.e. time runs from the date of postage of the First-tier Tribunal permission decision in the Upper Tribunal Procedure Rules, but runs from the date of deemed service in First-tier Tribunal first instance appeal decisions in the First-tier Tribunal Procedure Rules.

Various respondents questioned the continuation of the policy allocating service of decisions in relation to asylum appeals to the Home Office. In relation to this a respondent further suggested that there should be the power in the Rules which prevents the Home Office withholding the determination beyond the deadline for it to apply for permission to appeal to the Upper Tribunal, or to apply for a decision to be set aside.

Conclusion

The TPC have decided to retain the difference in the way time is calculated between the Upper Tribunal Procedure Rules and the First-tier Tribunal Procedure Rules, although it asks respondents to note that the time-limits are, in effect, identical. The difference in the way time is calculated arises because the TPC want to maintain consistency regarding temporal

calculations across all chambers, i.e. time is to be calculated from the date of postage not date of deemed receipt. The Upper Tribunal Procedure Rules therefore provide for time-limits commencing from the date of postage of a decision, or notice. The TPC are not able to alter the time-limit provisions for the First-tier Tribunal Procedure Rules as, under section 31 of the 2007 Act, the Lord Chancellor has the power to provide for procedure rules to be in force immediately before the transfer of a tribunal to have effect, but with appropriate modifications only. The “deemed service” provisions for time-limits, which account for time to start running from the date the document is deemed to have been received, will therefore remain in place for the First-tier Tribunal Procedure Rules until these provisions are looked at again by the TPC in any future amendments exercise.

In addition, the TPC has decided to retain the provisions regarding service of asylum decisions by the Home Office for the present time. In the joint response to the consultation “Immigration Appeals - Fair decisions; faster justice” it was stated that UKBA and the Tribunals Service “will take action to address any unnecessary delays, including looking at the practice of UKBA serving asylum decisions on appellants” (page 12 of that consultation response), and have made the decision to retain respondent service pending this review. It should be noted that the TPC would support changes to government policy to return responsibility for service of asylum appeal decisions to the Tribunals Service but do not think it appropriate to take any steps until the outcome of the government’s review. In addition, it is understood that UKBA have advised that they would prefer to allow some time to pass following the transfer of the immigration and asylum jurisdiction to enable them to review the policy from an informed point of view. The timescale for this review is not known at present.

Question 7

Do respondents consider that the rules for the First-tier Tribunal, proposed rules for the Upper Tribunal, and the draft Practice Directions/Practice Statements, provide a suitable framework for this jurisdiction?

Response

There was a mixed response to this. Various respondents again raised the issue of the continuation of the practice of the Home Office to effect service of Tribunal decisions for asylum appellants. It was also asserted that the furtherance of this practice cast doubt for asylum seekers over the independence of the Tribunal.

One respondent asserted that draft Practice Statements 2.1(8) and 9.4 were not compatible with the discretion bestowed on the Tribunal by the Article 234 of the Consolidated Treaty (which, from December 2009, is now Article 267 of the Treaty for the Functioning of the European Union). Practice Statements 2.1(8) and 9.4 state that only the Senior President or Chamber President (or a panel including either) can refer cases for a preliminary ruling from the First-tier Tribunal to the European Court of Justice. It was argued by the respondent that this Practice Statement fetters the discretion of the tribunal to make referrals. This is because it is maintained that the reference to “any court or tribunal” does not mean a particular body (e.g. the First-tier Tribunal (Immigration and Asylum Chamber) or Magistrates Court) but rather any composition or panel constituted to hear a particular case.

Respondents also argued that the insertion of the draft Upper Tribunal Procedure Rule 15(2A) was an unnecessary addition, given that the corresponding draft Practice Directions already provides a similar power. Further, another respondent argued that Rule 15(2A) was unnecessarily burdensome, as it would require representatives for the appellant or respondent to justify each piece of new evidence put before the Upper Tribunal, and could lead to satellite litigation if certain evidence was not permitted in any particular case.

Concerns were also raised about the draft Practice Directions which relate to the citation of unreported Tribunal decisions and the absence of any Gender Guidelines.

Conclusion

See the conclusion to question 6 for the TPC's response on the issue of service of asylum decisions by the Home Office.

The provision in the draft Practice Statements regarding which judicial members can refer appeals to the European Court of Justice for a preliminary hearing was removed by the Senior President of Tribunals when the Asylum and Immigration Tribunal transferred into the unified tribunal structure to prevent cross-jurisdictional inconsistencies. It is understood that the Upper Tribunal (Immigration and Asylum Chamber) President is currently drafting guidance on referrals to the European Court of Justice. It is not known when this will be published.

Finally, the TPC decided to retain Rule 15(2A) of the Upper Tribunal Procedure Rules. In doing so it had regard to the relevance of previous 2005 Rule 32(2), as examined in the judgment DK (Serbia) [2006] EWCA Civ 1747. The purpose of this rule is to ensure that the Upper Tribunal is in possession of all the relevant information in relation to the Upper Tribunal appeal. This is to maximise the occasions that the Upper Tribunal will be able to deal with an appeal in a single hearing (and, it follows, minimise the need for any adjournment). The usefulness of Rule 15(2A) is to be understood in the new two-tiered tribunal context and is not comparable to practices on reconsideration within the now defunct Asylum and Immigration Tribunal.

Concerns regarding the Reporting Committee and Gender Guidelines have been passed by the TPC on to the Senior President of Tribunals, as they do not refer to matters relevant to the Procedure Rules.

Question 8

Do respondents consider that anything proposed for inclusion in the practice directions/statements should more appropriately be included in procedure rules?

Response

There was mixed response to this. Two respondents expressed the view that the rules and practice direction/statements should be amalgamated into one document. Some respondents expressed views that the TPC should have oversight of any amendments or additions to immigration and asylum-related Practice Directions and/or Statements.

In addition, one respondent requested a First-tier Tribunal Procedure Rule amendment which would restrict the respondent's ability to amend their reasons for refusal during the lifetime of an appeal.

Conclusion

The TPC, under the current statutory scheme, do not have oversight of Tribunal Practice Directions/Statements. Section 23 of the 2007 Act gives the Senior President, and respective Chamber President, the power to give directions regarding the practice and procedure of the First-tier and Upper Tribunals. Section 22(2) of the 2007 Act provides that Tribunal Procedure Rules are to be made by the TPC. As such, the Rules and Practice Directions/Statements are made in different ways and by different people. It would therefore be impractical for the two to be codified on a statutory basis.

There were valid points raised in connection to this by respondents regarding difficulties in locating the Practice Directions on the Tribunal website. It is hoped that the reconfiguration of the Tribunal website, which was launched on 15 February 2010, has solved some of these issues.

Finally, the TPC cannot take forward the amendment to the First-tier Tribunal Procedure Rules, as proposed by one respondent. Amendments to the 2005 Rules at the time of transfer of the immigration and asylum appeal jurisdiction, as mentioned in the conclusion to question 6, could only be appropriate modifications necessary for the transfer. As such, this suggestion represents a substantive change to tribunal procedure which, although it could be considered at a later date, is unlikely to be introduced as the TPC do not possess the power to make such a rule.

Question 9

Are there any other areas of procedure or process that respondents consider should be set out in either a) procedure rules, or b) practice directions?

Response

Respondents mentioned the continued relevance of the Bail Guidance Notes for Adjudicators (May 2003) and the need for this to be updated and reissued. Respondents also queried the absence of the application of Guidance Note 8 on Unaccompanied Children, issued by the Chief Adjudicator in April 2004, within the body of the Practice Directions. Further concerns were raised on the absence of any express power to appoint a litigation friend for children or appellants with mental health issues. Finally one respondent felt that a readily accessible plain language guide to the rules and practice directions should be available.

Conclusion

The TPC passed many of these responses on to the Senior President of Tribunals as the responses either referred directly to matters covered by the Practice Statements and Practice Directions, or matters that the TPC considered were more appropriate for these than for Procedure Rules across the Upper Tribunal.

The Respondents

A total of 10 responses to the consultation were received, by email and post. A list of the respondents can be found at [Annex A](#).

General reply

First-tier Tribunal Procedure Rules

Following the consultation, although not strictly in relation to responses, the TPC did make some minor amendments to the 2005 and Fast-track Rules to clarify:

- (a) the provisions regarding deemed service and the related time-limits to the First-tier Tribunal for applying for permission to appeal to the Upper Tribunal (2005 Rule 24);
- (b) how the First-tier Tribunal promulgates decisions on applications for permission to appeal to the Upper Tribunal (2005 Rule 25(4)); and
- (c) how the First-tier Tribunal deals with late applications for permission to appeal to the Upper Tribunal for fast-track appellants (Fast-track Rule 17(2)).

Upper Tribunal Procedure Rules

Following comments from respondents on Rule 11 of the Upper Tribunal Procedure Rules, the TPC amended this rule to clarify (in line with Rule 48 of the Asylum and Immigration (Procedure) Rules 2005 for the First-tier Tribunal (Immigration and Asylum Chamber)), that only persons who are not prohibited pursuant to section 84 of the Immigration and Asylum Act 1999 may provide immigration representation.

Following the consultation, although not in relation to the responses, the TPC made some minor amendments to the proposed Upper Tribunal Procedure Rule amendments to clarify the time-limits for the appellant to submit their reply in relation to any response submitted by the respondent following a grant of permission for an appeal to the Upper Tribunal (Upper Tribunal Rule 25).

However, although the TPC has considered concerns raised by respondents to the consultation, it has decided to retain the special service provisions within the Upper Tribunal until the findings of the Government review on asylum is published.

It is expected that the TPC will look to amend the First-tier Tribunal Procedure Rules in due course and will be bringing time-limit provisions in line with the Upper Tribunal during that exercise.

Practice Directions and Practice Statements

Following the TPC consultation on amendments to the Upper Tribunal Procedure Rules, the Senior President published a separate consultation on the draft Practice Directions and Practice Statements for the immigration and asylum jurisdiction. Following comments from stakeholders the Senior President made some revisions and, in accordance with the 2007 Act, submitted the Practice Directions to the Lord Chancellor for approval. The Practice Directions and Practice Statements were published on 15 February 2010 and can be found on the Tribunals Service website:

Practice Directions:

http://www.tribunals.gov.uk/Tribunals/Documents/Rules/IAC_UT_FtT_PracticeDirection.pdf

Practice Statements:

http://www.tribunals.gov.uk/Tribunals/Documents/Rules/IAC_UT_FtT_PracticeStatement.pdf

Keeping the Rules under review

The TPC wishes to thank all those who contributed to this consultation process.

The TPC will monitor the operation of the Rules and will make amendments as and when it appears necessary. Any suggestions for amendments should be sent to the TPC Secretariat at the address below.

Contact details

Further copies of this report and the rules can be obtained by contacting the Tribunal Procedure Committee Secretariat at the address below:

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This report and the Rules are also available on the website:

www.tribunals.gov.uk/Tribunals/Rules/tribunalprocedurecommittee.htm

Annex A

List of respondents Asylum and Immigration Chamber Consultation

Organisation	Name
AJTC	Alex Hermon
Asylum Aid	Debora Singer/Nick Oakeshott
Bar Council - Law Reform Committee	Judith Farbey
Drummond Miller LLP/Glasgow Immigration Practitioner's Group	Angus McPherson
Immigration Law Practitioners' Association	Alasdair Mackenzie
Joint Council for the Welfare of Immigrants	Hina Majid
Office of the Immigration Services Commissioner	Duro Oyewunmi
Refugee & Migrant Justice	Daniel Furner
The Law Society of Scotland	Moira Shearer/Sam Condry
Howe & Co.	David Saldanha

Annex B

Membership of the Tribunal Procedure Committee

(as at December 2009)

Lord Justice Patrick Elias (Chair)

Bronwyn McKenna

Douglas May QC

Mark Rowland

Nick Warren

Philip Brook Smith QC

Carolyn Kirby

Michael James Reed

Lesley Clare

Alison McKenna

Peter Lane

George Bartlett QC