Tribunal Rules

Implementing part 1 of the Tribunal Courts and Enforcement Act 2007

Response to the consultation on the proposed new Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2013 & Amendments to the Tribunal Procedure (Upper Tribunal) Rules 2008

Reply from the Tribunal Procedure Committee

October 2014

Introduction

1. The Tribunal Procedure Committee ("TPC") is established under section 22 of, and Schedule 5 to, the Tribunal, Courts and Enforcement Act 2007 ("TCEA"), with the function of making procedural rules for the First-tier Tribunal and the Upper Tribunal. A list of the members of the TPC is set out at Annex A.

2. Under section 22(4) of the TCEA, the power to make rules is to be exercised with a view to securing that:

   - in proceedings before the First–tier Tribunal and Upper Tribunal, justice is done;
   - the tribunal system is accessible and fair;
   - proceedings before the First–tier Tribunal or Upper Tribunal are handled quickly and efficiently;
   - the rules are both simple and simply expressed; and
   - the rules where appropriate confer on members of the First–tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

3. In pursuing these aims the TPC seeks, among other things, to:

   - make the rules as simple and streamlined as possible;
   - avoid unnecessarily technical language;
   - enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
   - adopt common rules across tribunals wherever possible.

The Immigration and Asylum Chambers

4. The TPC's remit includes making rules for both the First-tier Tribunal (Immigration and Asylum Chamber) and the Upper Tribunal (Immigration and Asylum Chamber). These Chambers deal with appeals against government decisions in immigration, asylum and nationality matters.

5. When these Chambers were established, the previously existing Asylum and Immigration (Procedure) Rules 2005 and Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 ("AIT Rules") were ordered to have effect in the First-tier Tribunal. The only amendments made were those necessary for the transfer of work to the new Chamber. Amendments were also made to the existing Upper Tribunal Rules to make them suitable for the transferring appeals.

6. In 2013 the TPC launched a consultation on a new set of rules to govern proceedings in the First-tier Tribunal, with the intention of harmonising these rules with those in the other chambers and ensuring that they met the objectives set out for the TPC in the TCEA.

The Consultation Process

7. The purpose of the consultation was to seek views on draft First-tier Tribunal (Immigration and Asylum Chamber) rules ("The First-tier (IAC) rules").

8. As jurisdictions have been transferred to the First-tier Tribunal, the TPC has consulted on and made rules for each new Chamber. That process has resulted in 'core' rules of general application.

9. The TPC believes that these core rules work well across different Chambers. They make it easier for judges, practitioners and others to work across different Chambers. Upper Tribunal interpretations of core rules arising from a case in one Chamber are applicable across the different Chambers.

10. The TPC considers the core rules to be a sound starting point for consideration. The draft of the First-tier (IAC) rules drew heavily on these core rules. Each jurisdiction, however, requires modifications and additions to the core rules in order to provide for particular aspects of its work. The draft therefore contained such modifications and additions, relating to elements specific to the IAC jurisdiction.

11. The consultation sought views on all aspects of the draft rules.

12. There were 12 responses to the consultation — see Annex B.

13. Although, at the time of the consultation, it was anticipated that new rules would be laid in 2013, there has been some delay. This was due to a number of factors including the transfer of additional immigration judicial review responsibilities to the Upper Tribunal; work on rules for the First-tier Tribunal (Property Chamber); the introduction of the Immigration Act 2014; and operational changes within the Chamber.

Responses to consultation questions and conclusions

14. The questions asked in the consultation are set out below, with a summary of the responses. The conclusions of the TPC in light of these responses are then immediately set out.

15. In some cases, respondents referred to other information in their response to a question. Information referred to in this way was considered by the TPC in its deliberations and is included in the summaries below.

16. At the time of the consultation, many of the responsibilities for immigration presently with the Home Office were held by the former UK Border Agency. For ease of reading, this reply refers only to the Home Office.

17. The consultation responses led to revision of the draft Rules and therefore the numbering in the final version of the Rules differs from that consulted upon.

18. The TPC is grateful to all those who responded to the consultation. The responses have made a real contribution to the development of the Rules.

(1) Structure: Do you have any comment on the proposed structure of the Rules?

Four of the respondents endorsed the proposed structure. The others made no comment.

The TPC concluded that the proposed structure was suitable and it has been retained in the final version of the Rules.

As detailed below, the TPC concluded that it was appropriate to provide for a Detained Fast Track Procedure within the rules. This means that the Rules have been divided between the Principal Rules and the Fast Track Rules, which are contained in a Schedule.

(2) Do you consider it appropriate to calculate time-limits on the basis of when documents are sent, rather than received? If not, why not?

22. One respondent suggested that it was simpler to calculate dates from when documents were received, especially for litigants in person.

23. Although this was plainly true in some circumstances, the TPC concluded that, on balance, it was generally more appropriate to calculate from the date a document was sent — which could be clearly marked on correspondence. The TPC was in particular concerned that, where professional advisers were consulted, calculation of time-limits should be clear to them from the face of the document. The TPC concluded that this would be easier if deadlines were calculated from when documents were sent, rather than needing to rely on the recollection of litigants or the calculation of deemed service dates.

24. Two respondents raised concerns that although time-limits could, in principle, be calculated on the basis of when documents were sent, in practice, systems within the Home Office to record this information were 'all too often' unreliable.

25. The TPC recognised this concern, and the importance of accurately recording when documents were sent. However, the TPC concluded that such issues would arise regardless of the method by which time-limits were calculated. If time-limits were to be based on when documents were received, this would often be assessed through the mechanism of deemed service — which would be calculated from when they were sent.

26. One respondent said that the basis on which time-limits were calculated had the potential to cause confusion, but did not provide any further detail.

27. The TPC considered that least scope for confusion would arise if the date of sending a document was used.

28. For these reasons, and to maintain consistency with other tribunal rules, the TPC concluded that time-limits within the Principal Rules should generally be calculated on the basis of when documents were sent.

29. There is one exception to this general approach: rule 23 (Response: entry clearance cases). (See paragraphs 74-80 in relation to the distinction between responses in entry clearance and other cases).

30. Rule 23(3) (as made) requires the respondent in these cases to send a response to the tribunal within 28 days of receiving the notice of appeal from the tribunal. This rule arises from the particular circumstances of entry clearance cases, where both initial decisions and responses to appeals are made by entry clearance officers outside the UK. This means that the notice of appeal, with accompanying documents, must be sent securely outside the UK, and the response be securely returned. In many cases, this occurs via the diplomatic bag system, which can take up to six weeks to arrive. In other cases, especially in countries which receive a substantial number of requests for entry clearance, quicker processes are in place.

31. The TPC believes that the system of transporting these documents by diplomatic bag is unsatisfactory. It should not take up to three months simply for documents to travel between the tribunal and those responsible for producing the response, and back again. The TPC understands that the Home Office is actively working to establish a more efficient system.

32. While that is being done, however, the TPC needed to consider an appropriate rule. The TPC concluded that it was necessary temporarily to accommodate the present system of document delivery between the tribunal and entry clearance officers. The alternative would be routine applications either to extend time or to allow responses out of time. The TPC did not wish to provide for an extended time limit in all entry clearance cases, because that would result in a substantially extended deadline in those cases where documents were being transported more rapidly.

33. The TPC concluded that, in rule 23 (as made), it was appropriate to establish a deadline from receipt: requiring the response to be sent within 28 days of such receipt. This means that time does not start running until the notice of appeal is received by the entry clearance officer, who then has 28 days to send the response to the tribunal. The time that documents spend in transit therefore does not count towards the deadline.

34. The TPC will keep this matter under review and given its understanding of the work of the Home Office to improve efficiency, anticipates revising rule 23 in 2015.

35. One respondent noted that the use of ‘provided’ in the context of time-limits might be misleading.

36. The TPC agreed that, often, ‘provided’ was not the most appropriate word. Generally, within the Principal Rules it has been replaced with more appropriate language, such as ‘sent’.

37. ‘Provided’ has however been retained within the Fast Track Rules. The TPC concluded that, where appellants are invariably detained, ‘sent’ might cause confusion since documents are often simply given to those responsible for them whilst in detention.

(3) Do you consider the current time-limits in Immigration cases (i.e. those set out in the Draft Rules) appropriate? If not, why not? If you would prefer different time-limits what would these be? Why would these be better than the current time-limits?

38. Four respondents supported the extension of time-limits. These respondents noted that the existing time-limits for immigration cases were short compared with other jurisdictions. They also noted the potential for short time-limits to have a counter-productive impact: work done in haste could often not be done to an adequate standard, which caused later delays and difficulties. Short time-limits lead to hearings being adjourned unnecessarily; this could have the counter-intuitive impact of prolonging proceedings, when compared with longer time-limits that enabled hearings to go ahead as planned. Two respondents went further, and argued that the time-limits in immigration tribunals should be the same as in other tribunal jurisdictions.

39. The Home Office opposed extensions to the time-limits on the basis that they would increase detention costs; have adverse implications for detention capacity; and would increase the chance of bail being granted (with consequent risk of absconding). They would also increase the costs of providing asylum support benefits.

40. One respondent argued that there was no justification for having shorter time-limits for appellants in detention.

41. Given the general support for the proposed deadlines, the TPC concluded that they were appropriate.

42. The deadlines in the final version of the Principal Rules are therefore as set out in the timetable below. Note that the AIT rules drew distinctions between appellants in detention and those not, which no longer exist in the IAC Rules. Also, that for appellants outside the UK the date on which the 28 day time-limit begins will vary, depending on whether the appellant was able to appeal while they remained in the UK.

Time-limit	Final Rule	AIT Rules deadline	Draft Rule deadline	Final Rule deadline
Appeal by a person in detention	Rule 19(2)	5 business days	14 days	14 days
Appeal by a person inside the UK	Rule 19(2)	10 business days	14 days	14 days
Appeal by a person outside the UK	Rule 19(3)	28 days	28 days	28 days
Appeal to the Upper Tribunal by a person outside the UK	Rule 33(3)	28 days	28 days	28 days
Appeal to the Upper Tribunal by all other persons	Rule 33(2)	5 business days	14 days	14 days

(4) In relation to appeals where the applicant is outside the UK, should the Home Office have the same time-limit to appeal as the applicant?

43. Three respondents agreed that where the applicant is outside the UK, the Home Office should have the same, longer, deadline to appeal. The primary argument for this position was that there should be equality of arms between the parties in any individual case. One respondent also argued that the Home Office was in an analogous position to a litigant instructing a UK solicitor from abroad.

44. Two respondents disagreed, arguing that the Home Office was not an out of country litigant and did not suffer any of the disadvantages faced by those acting from abroad which justified the longer time-limit.

45. The TPC concluded that where an applicant is outside the UK, the Home Office should have the same time-limit to appeal as the applicant. This allowed for a more simply drafted rule, and avoided a situation where one party in a case would benefit from a longer time-limit than the other.

(5) Do you consider it appropriate that case management powers be provided for in a single Rule? If not, why not?

(6) Do you consider that Rule 4 is appropriately drafted? Please suggest any drafting changes.

46. Only two respondents commented on these questions, both expressing support for the approach and drafting of Rule 4.

47. The TPC concluded that no change to the draft was necessary.

(7) Do you think the Tribunal should have a power to strike out a party if their case has no reasonable prospect of success? If so, why?

(8) Do you think the Tribunal should have a power to strike out a party if their conduct of the case is frivolous, vexatious, abusive or otherwise unreasonable? If so, why?

(9) Do you think the Tribunal should have a power to make an 'unless order' i.e. an order which, if not complied with, will automatically lead to a strike out?

48. In the consultation document the TPC indicated that it had reached a preliminary view that it should not introduce a strike out power to the Chamber. First, a strike out decision could fall within The Appeals (Excluded Decisions) Order 2009, on the basis that it was a procedural, ancillary or preliminary decision. This would mean it could not be appealed to the Upper Tribunal and could only be challenged by an application for Judicial Review. This would create unnecessary confusion and make tribunal decisions inappropriately difficult to challenge. Second, given the Secretary of State's power to certify an appeal as clearly unfounded, there would be limited scope for strike out. Very few appeals would be suitable for strike out, but not appropriate to be certified as unfounded. Finally, most immigration cases are dealt with in a short hearing, which leads to a substantive decision. There is therefore limited scope for striking out cases being of any real advantage.

49. Four respondents agreed with the TPC's preliminary reasoning and argued that any power to strike out was inappropriate to the jurisdiction.

50. One respondent agreed in relation to strike out itself, but did support the possibility of 'unless orders' on the basis that they could be suitable if they were used carefully and subject to a right of appeal.

51. The TPC agreed that such orders would only be suitable if they could be appealed or reconsidered by the tribunal. Otherwise, a power intended to allow for rapid resolution of cases might only prolong them by giving rise to satellite litigation. Given the difficulties with the Excluded Decisions Order, referred to above, the TPC concluded that this would not be possible without a change to legislation outside the TPC's remit.

52. One respondent argued that strike out powers should be available, since they were available in the civil jurisdiction. That respondent also argued that they might be used carefully in cases where an appeal is brought to secure the advantage of delay in the enforcement of an adverse immigration decision.

53. Whilst recognising that in immigration appeals — in contrast to most litigation — an appellant may have an incentive to delay the resolution of proceedings, the TPC concluded that strike out would not be an effective way of preventing this for the reasons set out above.

(10) Do you think that the tribunal should have the power to award costs or expenses against a party who has acted unreasonably?

(11) Do you agree with the current draft of Rule 9?

(12) Should the draft rule be extended to give the tribunal jurisdiction to award costs or expenses in response to any non-compliance with a rule or order?

(13) If there was not to be jurisdiction to award costs or expenses in the First-tier Tribunal on the basis of unreasonable conduct etc, should the Upper Tribunal nevertheless have such a power?

54. Two respondents agreed that the Tribunal should have the power to award costs against a party who acts unreasonably. They highlighted a perception that there was a very high rate of non-compliance with rules and directions and hoped that a costs power might combat this, to the benefit of other parties and stakeholders.

55. One respondent suggested that a power to award costs as a sanction against the Home Office would be advantageous. They also suggested that a wasted costs power in relation to an appellant's representative might be appropriate. However, they argued that it would not be acceptable for appellants to be at risk of costs because they are likely to be unfamiliar with the rules, without the ability to speak or write English, and without advice.

56. The TPC concluded that an asymmetrical costs power, in which one side might be subject to costs, but the other would not, was not appropriate in this jurisdiction. The TPC recognised that the characteristics and circumstances of a litigant will be highly relevant to a decision on costs. What would be unreasonable conduct on the part of a well-resourced, sophisticated litigant might not be seen as such if done by appellants struggling to do their best in a foreign language. The TPC concluded, however, that this could be a matter for assessment by Tribunal Judges. It did not justify a system of asymmetrical costs in this jurisdiction.

57. The Home Office argued that it was premature to introduce a costs power, because there were ongoing operational measures to improve quality of representation by the Home Office and that introducing other measures, such as costs, to address similar issues was premature.

58. The TPC disagreed with this argument. There was no reason why both Home Office and TPC efforts to promote efficient and fair disposal of cases should not be taken forward at the same time.

59. The Home Office also suggested that it was insufficiently clear what constituted unreasonable behavior.

60. The TPC disagreed. The Rule's formulation had worked in other jurisdictions and there was not likely to be, in practice, difficulty in determining what was and was not unreasonable conduct.

61. The two respondents who commented on an extension of the jurisdiction to cover any breach of a Rule or order opposed the extension.

62. The TPC agreed. Not all such breaches are necessarily to be characterised as unreasonable conduct, nor warrant the award of costs. It was desirable that the rules reflect that.

(14) Should the Tribunal have the discretion to continue with an appeal, rather than treating it as withdrawn, when the decision to which it refers has been withdrawn?

63. Five respondents supported this proposal. These respondents argued that bare withdrawals of the underlying immigration decision were too common and had the effect of frustrating the tribunal process. They also suggested that, in some cases, withdrawal of the underlying decision by the Home Office was motivated by tactical reasons — such as addressing perceived inadequacies in the decision or gaining time to seek new evidence. These circumstances, the respondents suggested, could be more appropriately addressed by applying for case management orders, such as adjournments.

64. The TPC agreed that withdrawal of the underlying decision should not be used to secure tactical advantage within the tribunal process and that the Rules should seek to prevent this.

65. The Home Office objected to the proposal. It argued that where the underlying decision had been withdrawn, there was no longer any matter for the tribunal to determine. It also raised concerns about the practicalities of assessing, in a large number of appeals where the underlying decision had been withdrawn, whether the appeal should nonetheless continue. Even if this could be done, it argued, the cost implications for both the Home Office and the Tribunal would be significant.

66. The TPC recognised that in the majority of cases where the underlying decision was withdrawn it would not be appropriate for the appeal to continue.

67. Finally, the Home Office argued that the concerns raised about improper withdrawals were unnecessary, since Home Office policy was only to withdraw the underlying decision where the intention was to grant the application. Where new points were to be raised Home Office policy was that:

> "A decision should not be withdrawn simply because better or stronger reasons for refusal could be given. If a Presenting Officer concludes that there were additional grounds for refusal, these should be discussed with an Appeals and Litigation

Directorate Senior Caseworker and — where it is agreed that it is appropriate to raise additional matters — the Presenting Officer should do so in writing to the Representative / Appellant and the Tribunal."

68. The TPC considered a number of possible approaches in the Rules. The approach set out in the consultation secured a discretion for the Tribunal, allowing it to continue to hear an appeal, notwithstanding the withdrawal of the underlying decision. Although this would help ensure withdrawals were not misused, it would also absorb considerable resources as regards both the Tribunal and litigants. In many cases, where the underlying decision had been withdrawn, the appellant would not wish to continue the case or it would be inappropriate for them to do so. Identifying those cases where the option to withdraw the underlying decision was being used improperly would also be challenging; in many cases the misuse would not become apparent until after a new decision was made. This would make it impossible for a tribunal, at the point of withdrawal, to distinguish those cases.

69. The TPC therefore also considered a formulation in which withdrawal of the underlying decision would end the appeal — but would also provide for an application to reinstate the appeal by the appellant. This would provide some security against improper withdrawal, but limit the resource implications to those cases where an application to reinstate was made. It would, however, mean that cases would initially be withdrawn, resulting in the loss of any listed hearing.

70. This possibility was raised by the TPC with the Home Office, who argued against it. The Home Office suggested that it might not be possible to remove an individual from the UK while the possibility of reinstatement existed. It also suggested that appellants might deliberately withdraw their appeal, with the intention to apply to reinstate it later, as a tactical measure to prolong their time in the UK. The Home Office also raised the possibility that many unnecessary applications to reinstate would be made by appellants either frustrated because a new decision had not yet been made by the Home Office or out of confusion over the appellant's immigration position.

71. The TPC did not consider that the possibility of reinstatement of an appeal would cause any significant issues with removal. Once an appeal had been withdrawn there would be no ongoing proceedings. The fact that there might, at some point in the future, be proceedings again did not alter that position. The TPC also concluded that there was no realistic possibility of litigants seeking to abuse any reinstatement process tactically. Any potential tactical advantage was hard to discern. Withdrawal would, in any event, run the very substantial risk that the tribunal would not agree to reinstate — especially if it appeared that the appeal had been withdrawn for tactical reasons.

72. But the TPC did agree that there was a real possibility of reinstatement applications using an excessive amount of resources, given that reinstatement would only be appropriate in a small number of cases. In light of the Home Office's clear statement of policy (see above), the TPC also concluded that the danger of tactically motivated withdrawals was reduced.

73. The TPC therefore concluded that it was unnecessary to provide a residual discretion to continue a case or a process for reinstatement. Instead, Rule 17(2) (as made) requires that notice of the withdrawal of an underlying decision be accompanied for the reasons for that withdrawal. The TPC anticipates that this will encourage compliance with the Home Office policy, and allow the TPC to monitor the nature of withdrawals. The TPC will keep this area of the rules under close review.

(15) Should the Respondent be required to set out whether it opposes the appellant's case and the grounds for doing so?

(16) Is there any other material which the respondent should be required to provide?

74. Four respondents supported a requirement that the Home Office should set out whether it opposed the appellant's case and the grounds on which it did so. They said that the Appellant should know the case against them and that it would assist the Tribunal to have the issues clarified prior to the hearing. A number of respondents argued that there was no reason, in principle, why the government should not be required to set out its position in immigration cases in the same way as required in criminal, civil and other tribunal cases.

75. The Home Office resisted the proposal on the basis that it would produce significant additional work, but provide little benefit. It argued that it would already have set out the reasons for the initial decision, and that repeating these once tribunal litigation had started would serve little purpose.

76. The Home Office also identified difficulties in producing a response in the absence of documents produced by the appellant. It noted that these were not always produced in a timely fashion and, when they were not, the Home Office could not be certain of its final position until they were. It argued that this meant that it was more effective to "triage" cases close to the hearing date, rather than produce responses shortly after the notice of appeal was lodged.

77. The Home Office did, however, accept that in entry clearance cases responses were being produced and sent to both the appellant and Tribunal.

78. The TPC concluded that, in principle, both parties should know the case that they had to meet. It was therefore unsatisfactory that under the existing AIT rules, there had never been a requirement to produce a response or set out the grounds on which the appeal was resisted. However, the TPC was sympathetic to the argument that where the grounds of the Home Office resistance were unchanged from initial decision, producing a response that simply reiterated the same information was not an efficient use of resources and might delay the tribunal process.

79. The Final Rules therefore require a response only if the Home Office wishes to change or add to the grounds relied upon in the decision notice. The TPC anticipates that this will give the benefits of requiring a response in all cases, by ensuring the case against the appellant is clearly set out in either the initial decision or a subsequent response. At the same time it will avoid duplication of work where the Home Office decision remains unchanged since the decision notice.

80. Since in entry clearance cases responses were already being produced by entry clearance officers and this appeared to be working well, the TPC concluded that, in those cases, the Home Office would be required to produce a response. This was intended to align the Rules with the current practice.

(17) Should decisions in asylum appeals continue to be served by the First-tier Tribunal only on the respondent, on the basis that the latter will then serve the decision on the claimant, or should the First-tier Tribunal serve such decisions on both parties simultaneously?

81. Five respondents argued that the First-tier Tribunal should serve decisions on both parties simultaneously. They argued that the previous practice of serving asylum decisions on the Home Office, who then served the decision on the appellant, gave rise to the appearance of favouring one party to litigation over the other. In principle, they argued, it was unsatisfactory for one party to litigation to be responsible for

serving the tribunal's decision on another party. It led, they suggested, to the appearance of bias on the part of the tribunal. It also gave the Home Office a potential advantage, in that it had a head start when considering an appeal. One respondent also suggested that there had been practical problems with the Home Office's service of decisions; with service in some cases being subject to substantial delays.

82. The Home Office argued in favour of the current practice of decisions being served on them first. It made, essentially, two arguments. First, that allowing the Home Office, in appropriate cases, to serve decisions in person was an important part of preventing unsuccessful appellants absconding and ensuring effective removal of unsuccessful appellants. Second, that giving the Home Office prior knowledge of unsuccessful appeals allowed them to take steps to assist vulnerable appellants by notifying local safeguarding representatives where there was a risk of self harm.

83. The Home Office also provided information to the TPC on the numbers of decisions being served in person in different categories of decision, which is set out below:

	First-tier dismissed	Upper Tribunal dismissed	First-tier Refusal of permission to appeal	Upper Tribunal Refusal of permission to appeal				
	Total Received	Served in person	Total Received	Served in person	Total Received	Served in person	Total Received	Served in person
2012	6624	27 (0%)	1276	17 (1%)	3727	24 (0%)	2628	327 (12%)
2013	5182	13 (0%)	1300	5 (0%)	3178	11 (0%)	2319	225 (10%)
Monthly Average	475	2 (0%)	107	1 (1%)	288	1 (0%)	206	23 (11%)

84. The TPC agreed that there may seem to be an inequality of arms if one party received a decision before the other and had responsibility for serving it on an opposing party. The issue was whether this could ever, in principle, be permissible. The TPC concluded that it could, but only where there was a powerful public policy rationale to justify it.

85. In the case of asylum decisions, the potential public policy benefit was the effective management of the UK immigration system, including avoiding unsuccessful appellants absconding. The TPC concluded that this was an appropriate matter for the TPC to consider in the context of the rules. It was part, in the wider sense, of ensuring that justice was done in proceedings before the tribunal. It would not be just for the rules to facilitate circumstances in which the tribunal's decisions could be deprived of effect.

86. The TPC accepted the argument that there was justification for service on appellants via the Home Office in order to manage the immigration system and reduce the possibility of unsuccessful appellants absconding. However, this only applied to decisions by the Upper Tribunal that brought the tribunal case to an end — decisions to refuse permission to appeal.

87. In other cases the risk of appellants absconding was low, either because they still had the opportunity to challenge the decision within the judicial process or because the appeal was successful. This was reflected in the extremely low use of service in person by the Home Office in other circumstances.

88. The TPC also considered the issue of vulnerable appellants. However, it was unclear to the TPC what was the basis for the Home Office sharing information with 'local safeguarding representatives' or precisely who these representatives were. It was also unclear what information was being shared and what the perceived benefits to vulnerable appellants were. The TPC concluded that where there was reason to believe that an appellant was vulnerable and that special steps should be taken in relation to the service of the decision, this was a matter that should be raised with the tribunal which could make appropriate orders using its general case management powers. In appropriate cases, this might involve notifying people other than the appellant of the outcome, before notifying the appellant, either through the Home Office or by the tribunal itself.

89. Rule 29 (as made) therefore requires that the tribunal serve notice of decisions on all parties, simultaneously.

90. While the TPC's consideration of the First-Tier (IAC) Rules was ongoing, it was noted that the Upper Tribunal Rules provided for service on the Home Office of final decisions, but not decisions refusing permission to appeal. Both the Home Office and HMCTS had been operating on the basis that decisions refusing permissions for appeal should be served on the Home Office first.

91. The TPC therefore included in the Tribunal Procedure (Amendment No.2) Rules 2014 an amendment to the Upper Tribunal Rules, namely rule 40A, to permit service on the Home Office first of written decisions on permission to appeal. This was an interim step intended to avoid disruption to existing systems until a final decision could be taken.

92. Following the TPC's decision to restrict service on the Home Office to decisions in the Upper Tribunal that exhausted an appellant's appeal rights before the tribunals, the Tribunal Procedure (Amendment No. 3) Rules 2014 amended the Upper Tribunal rules further. A new Rule 22A sets out the process whereby decisions to refuse permission to appeal are served first on the Home Office. Rule 40A was removed, meaning that other decisions by the Upper Tribunal will be served on both parties simultaneously.

(18) Do you think that the Tribunal, outside asylum and humanitarian protection cases, should provide written reasons only on request?

(19) Are there any other categories of case in which written reasons should be produced only on request?

(20) If the rules do take this approach, is draft rule 28 satisfactory?

93. Four respondents, including the Home Office, opposed this approach, arguing that it was unnecessarily complex and, given the nature of the immigration jurisdiction, would not produce any real saving of resource. In practice, they suggested, a written decision would almost always be requested. A process in which these were not produced in the first instance would therefore save little time, while introducing delay and inefficiency into the process. Judges would need to re-examine their notes of decisions some time later in order to produce written reasons. This would, overall, take longer than producing written reasons as a matter of course at the time a decision was made. There would also be delay while an application for written reasons was made, extending the overall timescale of tribunal proceedings.

94. One respondent supported the suggestion, on the basis that it would bring the practice of the IAC closer to other tribunals.

95. The TPC agreed with the majority of respondents that in many cases it would be more efficient for written reasons to be produced as a matter of course, rather than waiting for an application. However, the TPC concluded that an option for the tribunal to give an oral decision only, unless reasons were requested, was potentially helpful in a small number of cases. Rule 29 (as made) therefore allows for this discretion.

Repeat applications for bail

(21) Do you think that there should be restrictions on the ability of an applicant to make repeated applications for bail?

(22) If there are to be such restrictions, do you agree with the approach taken in Draft Rule 38?

(23) Do you agree that an applicant should be required to set out any change of circumstances that has occurred since any previous application for bail?

96. Two respondents supported the possibility of restrictions on repeated applications for bail. These respondents argued that repeated applications for bail, where there was neither the passage of significant time nor a material change circumstances, consumed an excessive amount of resources, which could be put to better use.

97. One respondent supported the possibility of restrictions in the Rules, on the basis that they reflected current practice and procedure. (Since this was not the TPC's understanding of the status quo this response was disregarded.)

98. Four respondents argued against restrictions. They pointed to the importance of the underlying issue; liberty being a fundamental right that could be restricted only with great care. They noted the importance of an oral hearing, at which a judge could assess the credibility of an applicant and issues could properly be addressed by both the applicant and any legal representative. This sort of assessment would not be possible on the papers.

99. The TPC's deliberations on these issues, however, were overtaken by the introduction of the Immigration Act 2014. Section 7 of the Act introduced into the Immigration Act 1971 provisions that required that:

> "Tribunal Procedure Rules must secure that, where the First-tier Tribunal has decided not to release a person on bail under paragraph 22, the Tribunal is required to dismiss without a hearing any further application by the person for release on bail (whether under paragraph 22 or otherwise) that is made during the period of 28 days starting with the date of the Tribunal's decision, unless the person demonstrates to the Tribunal that there has been a material change in circumstances."

And:

> "Tribunal Procedure Rules must secure that, where the First-tier Tribunal has decided not to release a person on bail under paragraph 29, the Tribunal is required to dismiss without a hearing any further application by the person for release on bail (whether under paragraph 29 or otherwise) that is made during the period of 28 days starting with the date of the Tribunal's decision, unless the person demonstrates to the Tribunal that there has been a material change in circumstances."

100. The introduction of primary legislation requiring rules to be made in a particular form rendered the TPC's discussion of the appropriate rule moot. The Final Rules implement the requirements of the Immigration Act in Rule 39(3).

<u>Applications in relation to bail in Scotland — Rule 44</u>

(24) Does this Rule adequately provide for bail applications in Scotland? If not, what changes should be made?

101. Two respondents suggested that the form of the rule was potentially cumbersome or confusing, and suggested either incorporating references to Scottish provisions within the principal rules or producing a separate set of rules for bail applications in Scotland.

102. The TPC agreed that a single Rule providing for substitutions to the other bail rules in relation to Scotland had disadvantages. However, both suggested alternatives also had

disadvantages. Incorporating Scottish provisions directly into other Rules would add to their length and complexity — making them harder to understand. Producing duplicate Scottish rules would add significantly to the overall length of the Rules.

103. The TPC therefore concluded that a single rule amending the other bail rules for Scotland was the best approach.

Fast Track

(25) Should there be a separate set of rules for Detained Fast Track cases? Why

(26) If there is to be a separate set of rules, should there by any change to the existing Fast Track Rules?

104. Six respondents said that there should not be a separate set of Detained Fast Track cases.

105. Some respondents argued that it was wrong for one party to the proceedings to be in a position to dictate what procedural rules applied to the resolution of an appeal: it is the government who determines which appellants are in Detained Fast Track, by deciding which appellants to detain in the designated centres. This, in turn, determines whether the fast track procedure will apply. This, respondents argued, was fundamentally unsatisfactory, especially since the fast track procedure did not permit the tribunal to review the decision that an appellant should be in fast track. The situation was made worse, they argued, by the restriction on the tribunal's power to remove cases from fast track.

106. Several respondents provided detailed criticism of the existing Fast Track Rules. They argued that the time periods within the rules were too short, to the point that this rendered the process unfair, by preventing appellants engaging effectively with the tribunal. They also argued that the restrictions on the tribunal's usual case management powers — for example to adjourn hearings — prevented the tribunal doing justice in individual claims.

107. Two respondents, including the Home Office, argued that the present Fast Track Rules worked well and should be retained as vital. The Home Office argued that if the fast track was removed it would lead to:

- Increased detention costs
- Lack of detention capacity
- Prolonged detention that might be successfully challenged and was not in the interests of the detainee
- Delayed removal

108. The Home Office noted that Detained Fast Track had been the subject of legal challenges, which had been unsuccessful. However, the Home Office response was received prior to the judgment in *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245, which found that the fast track procedure was being operated unlawfully, because of the lack of ability on the part of appellants to instruct lawyers in a timely fashion. The TPC considered Mr Justice Ouseley's judgment, which included a wide-ranging assessment of the operation of fast track.

109. After careful consideration, the TPC concluded that it should provide for a fast track process, but with significant modifications.

110. First, the TPC concluded that some of the existing time limits in fast track were too short. As well as creating unfairness, this had the potential to extend the timescale of cases, by creating the need for adjournments and for cases to be removed from fast track, because they could not be dealt with within the short timescales provided by the rules.

111. The TPC has therefore extended the time for listing a hearing from two business days to three. At the same time, the TPC has provided that a practice direction may extend this deadline to six working days. The TPC's intention, formed after exchanges with both HMCTS and the Home Office, is that this power will be used to run a pilot scheme in 2015, where certain cases are given a longer time-limit. This will allow the TPC fully to assess the impact of a longer time limit, both on the fairness of proceedings and on the need for adjournments / removal from fast track.

112. The TPC also considered it appropriate to extend the time limit to apply for permission to appeal to the Upper Tribunal from 2 working days to 3.

113. The TPC has also simplified the rules relating to decision to adjourn and to remove a case from fast track.

114. Two respondents to the consultation suggested that if Fast Track Rules were to be drafted, they should be subject to another consultation. The TPC decided that a further consultation was unnecessary. Respondents had made detailed comments on the existing fast track rules, which the TPC was able to take account of.

115. The TPC will keep the Fast Track Rules under review and welcomes any suggestions for improvement.

Upper Tribunal

(27) Do the draft Rules require any changes to the Upper Tribunal Rules?

116. Some respondents suggested changes to grant the Upper Tribunal a costs jurisdiction, if one was not provided in the First-Tier. They also suggested changes relating to the removal of the Fast Track Rules.

117. Given the decisions set out above, these amendments were not necessary.

General views

(28) Do you think that the draft Rules work satisfactorily? Do you foresee any particular problems? Or have any improvements to suggest?

(29) Do you have any other comments?

118. Since the comments made by respondents to the consultation under these questions dealt with the full range of the rules, this section deals with each rule in turn. In order to make the comments easier to follow, this reply refers to the final version of the rules, rather than the version consulted on.

119. The reply does not record suggestions for minor amendments, such as unnecessary technical language and mistakes in cross-references — although a number of these were received and gratefully adopted.

Rule 3 — Delegation to staff

120. The Home Office commented that it would welcome the delegation to Tribunal staff of decisions relating to adjournments because it would speed up the process of list changes.

The Home Office also suggested that allowing 14 days to challenge an administrative decision to a judge might lead to abuse or delay.

121. Two other respondents argued that that staff should not be responsible for substantive decision making.

122. Consideration as to which judicial decisions should be delegated to staff is not a matter for the TPC, but the Senior President of Tribunals in accordance with rule 3(2). In relation to the ability to appeal judicial decisions made by staff to a judge, the TPC concluded that this was an important safeguard and that 14 days was an appropriate period of time that had worked well in other jurisdictions. If there is evidence that it is being abused, the TPC will reconsider it.

Rule 6 — Failure to comply with rules

123. The Home Office was concerned that the flexibility to waive the need to comply with a requirement in the rules would create uncertainty as to the extent that rules need to be complied with and whether the tribunal would waive a requirement.

124. Although recognising that the tribunal's ability to waive the strict requirements of the rules might give scope for uncertainty, the TPC concluded that it was necessary to provide for a just tribunal process. A system where any technical breach of a rule, no matter how unimportant, could invalidate the process — even if it was only discovered much later in the proceedings — would be profoundly unfair.

Rule 13 — Use of documents and information

125. Two respondents raised concerns about the proposed power of the tribunal to prohibit disclosure of a document or information to a person where it was likely to cause that person or some other person serious harm. They argued that there had been no demonstrated need for this power in the immigration context. They also suggested that the importance of open justice and the right for parties to know the case against them made the rule inappropriate.

126. The TPC agreed that both open justice and the right to know the case brought by the other side are important principles. However, the TPC concluded that, in certain circumstances, these principles must give way to other considerations and that the need to avoid causing serious harm was one such consideration. The TPC recognised that this would involve difficult decisions for tribunal judges where such important principles came into conflict. It is important to note that the rule gives discretion. The fact that disclosure is likely to cause serious harm does not mean that it must, or should, be withheld. It will be a matter for the tribunal to determine, in the individual case. The TPC concluded that this was the appropriate position.

Rule 19 — Notice of appeal

127. One respondent suggested that the rules should include specific provision for detainees to lodge a notice of appeal by serving it on the person in whose custody they are held. The TPC believes that this is covered by Rule 12(1)(e) which allows the tribunal to identify other appropriate methods for sending documents.

Rule 26 — Public and private hearings

128. One respondent argued that this rule gave the tribunal an inappropriate discretion to hear cases in private, which was against the fundamental principles of justice.

129. The TPC disagreed. The rule provides a discretion. That discretion must be exercised judicially, that is with regard to the important principles of justice, including open justice.

Rule 32 — Setting aside a decision which disposes of proceedings

130. The Home Office and one other respondent suggested that the rule exacerbated an existing uncertainty as to when matters should be dealt with by the First-tier (IAC) re-examining a decision or when they should be appealed to the Upper Tribunal.

131. The TPC considers that rule 36, which allows any application for a decision to be corrected, set aside or reviewed, or for permission to appeal, means that any ambiguity is more theoretical than real. In practice, the tribunal will be able to deal with any application in the most appropriate way.

Bail

132. A number of respondents suggested that the bail section of the draft rules was unclear and potentially confusing.

133. The TPC accepted that this point had force, and this has been substantially redrafted.

Rule 38 — Bail applications

134. The Home Office noted that this rule did not cover situations where the applicants offered their own recognizance.

135. This has been addressed by the TPC in rule 38(3)(d).

136. The Home Office and one other respondent also noted that the previous rule that the tribunal must serve a bail application on the Home Office as soon as reasonably practicable had been omitted. This has been added in rule 38(6).

Bail Hearings — Evidence on oath

137. The Home Office suggested that there should be a rule requiring that evidence at bail hearings be given on oath. It argued that this would allow consistency and strengthen the immigration system by providing for the possibly of a perjury prosecution.

138. The TPC was satisfied that, under the draft rules, the Tribunal is able to take evidence on oath and that the Judge is in the best position to decide whether this is appropriate in any given case. A requirement that all evidence be given on oath or affirmation would be unnecessarily prescriptive and potentially delay proceedings.

Children and adults lacking capacity

139. Several respondents to the consultation suggested that the rules should include provision for the tribunal to appoint a representative where an appellant is a child or lacks capacity.

140. The issues of litigants lacking capacity and how that is best dealt with by the tribunal are important ones, which are not restricted to immigration cases. For that reason the TPC concluded that it was preferable to consider these issues across tribunal jurisdictions, rather than only in relation to the IAC rules. This may lead to further consultation at a future date.

Expert witnesses

141. One respondent argued that the rules should include provisions relating to the instruction of expert witnesses, similar to CPR Part 35. It argued that this would give the tribunal powers to restrict expert evidence where appropriate, set written questions to experts, and for the instruction of joint experts.

142. The TPC agreed that such orders might be useful, but concluded that they were possible using the tribunal's general case management powers under rule 4. There is also a Practice Direction providing guidance on the use of expert evidence.

Overall Conclusion

143. In the light of the responses, the TPC have made some substantial alterations to the proposed rule changes, as set out above. The TPC considers that the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 are generally appropriate and sufficient.

144. The new set of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules came into force on 20 October 2014.

Keeping the Rules under review

145. The TPC wishes to thank all those who contributed to the consultation process. Consultation is a fundamental part of the rule-making process. We have benefited considerably from the responses to our consultations.

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

Contact Details

147. Any suggestions for amendments should be sent to the Tribunal Procedure Committee Secretariat at:

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102 Petty France
London
SW1H 9AJ

Email: tpcsecretariat@justice.gsi.gov.uk

Copies of this report can be obtained from that address or on the website: https://www.gov.uk/government/publications?departments[]=tribunal-procedure-committee. And the Rules can be found at https://www.gov.uk/government/publications?departments[]=tribunal-procedure-committee.

Annex A

List of TPC Members

Mr. Justice Langstaff	Chairman - Appointed by the Senior President Tribunals
Brian Thompson	Former Member of, and nominated, by AJTC - Appointed by the Lord Chancellor
Michael J Reed	Free Representation Unit - Appointed by the Lord Chancellor
Philip Brook Smith QC	Barrister - Appointed by the Lord Chancellor
Simon Cox	Barrister - Appointed by the Lord Chancellor
Douglas May QC	Upper Tribunal Judge - Appointed by the Lord President of the Court of Session
Simon Ennals	First Tier Tribunal Judge - Appointed by the Lord Chief Justice of England & Wales
Mark Rowland	Upper Tribunal Judge - Appointed by the Lord Chief Justice of England & Wales
Jayam Dalal	First-tier Tribunal Member - Appointed by the Lord Chief Justice of England & Wales

Annex B

List of respondents

HMCTS (Jurisdictional & Operational Support Team-Tribunals)
Legal Strategy Team, Immigration & Border Policy Directorate - Home Office
Margaret McCabe, Administrative Justice Unit, WGO
The Lord President of the Court of Session
The Bar Council
Immigration Law Committee - Law Society of England & Wales (ILC)
Scottish Immigration Law Practitioners' Association (SILPA)
Doughty Street Chambers Immigration Team
Dr Adeline Trude - Bail for Immigration Detainees
The Immigration Law Practitioners' Association (ILPA)
Council of Immigration Judges
Michael P. Clancy O.B.E. Director, Law Reform, The Law Society of Scotland