Tribunal Procedure Committee

Consultation on possible changes to the First-tier Tribunal (General Regulatory Chamber) Rules 2009 in connection with withdrawals of appeals

Introduction

1. The Tribunal Procedure Committee (the "TPC") is the body that makes Rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. Both are independent tribunals, and the First-tier Tribunal is the first instance tribunal for most jurisdictions. Further information on Tribunals can be found on the HMCTS website at: www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about#our-tribunals

2. The TPC is established under section 22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

3. Under section 22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
   (a) in proceedings before the First–tier Tribunal and Upper Tribunal, justice is done;
   (b) the tribunal system is accessible and fair;
   (c) proceedings before the First–tier Tribunal or Upper Tribunal are handled quickly and efficiently;
   (d) the rules are both simple and simply expressed; and
   (e) 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.

4. In pursuing these aims the TPC seeks, among other things, to:
   (a) make the rules as simple and streamlined as possible;
   (b) avoid unnecessarily technical language;
   (c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
   (d) adopt common rules across tribunals wherever possible.

5. The TPC also has due regard to the public sector equality duty contained in section 149 of the Equality Act 2010 when making rules. Further information on the TPC can be found at our website: www.gov.uk/government/organisations/tribunal-procedure-committee

6. The First-tier Tribunal is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills. One of the Chambers of the First-tier Tribunal is the General Regulatory Chamber (the "GRC", and the Rules which apply there are the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the "GRC Rules"). These Rules can be found in the "Publications" section of our website: www.gov.uk/government/organisations/tribunal-procedure-committee

7. The GRC is responsible, in particular, for handling appeals against decisions by a wide range of government regulatory bodies.

This Consultation

8. The purpose of this consultation is to seek views as to possible changes to the GRC Rules in relation to withdrawals of appeals. Below you will find further information on the following:

   - background to the consultation
   - possible amendment of the GRC Rules
   - the consultation questions
   - how to respond and by when.

The consultation questions are also in a separate Word document on our website, which can be used for submitting your response.

Background to the Consultation

9. In jurisdictions in which appeals fall for determination in the GRC, there is the possibility that after an appeal against a decision has been initiated the decision is reconsidered by the decision-maker (usually, a regulator), with an outcome favourable to the appellant. For convenience at this stage, we term this revocation or withdrawal of the decision.

10. There may be a distinct statutory authority governing a reconsideration or review of a decision. This might be important as regards the *locus standi* of an appellant before the Tribunal (for example, it may be stipulated that an appellant must first proceed through a 'review' stage with the regulator, before they can appeal). But a statutory regime for reconsideration/review may be unconnected to a right to appeal the decision.

11. In some cases, a decision will be revoked/withdrawn outside any statutory framework of 'review'. As a matter of general principle under public law, a regulator always has power to revoke/withdraw a decision it has made, and that is the case even when the decision is under appeal. The revocation/withdrawal of the decision does not however remove jurisdiction from the Tribunal (see *SM (Pakistan)* [2014] UKUT 00064 (IAC).) It is conceivable however that a regulator, having looked in vain for a statutory basis for revocation/withdrawal of a decision, may simply inform the appellant that the decision is no longer relied on.

12. There are presently 4 ways in which an appeal may be disposed of in the GRC upon the decision under appeal being revoked/withdrawn.

    (i) Withdrawal of the appeal under GRC rule 17
    (ii) Non-opposition to the appeal
    (iii) Consent Order encompassing either (i) or (ii)
    (iv) Strike out of the appeal under GRC rule 8

13. However, it is considered that there should also be a simpler and more efficient way to deal with these cases. There are administrative consequences for the GRC which follow from a decision being revoked/withdrawn. In particular, the appeal may still have to be the subject of a (reasoned) decision, and may even have to be listed for a hearing. This is so for non-opposed appeals: the case still has to be listed in front of a judge (or a full panel, in some cases) and formally decided. It is considered that this is wasteful of resource, when common sense would suggest that in most cases the appeal should be disposed of, administratively, at minimal cost and inconvenience.

14. It is proposed below how that might be achieved. First, we consider the 4 routes to disposal listed in paragraph 12 above, in the context of cases in which a decision had been revoked/withdrawn.

Withdrawal of the appeal under GRC rule 17

15. GRC rule 17 is as follows.

> ***Withdrawal***
> ***17.****—(1) Subject to paragraph (2), and, in the case of a withdrawal of a reference from an ethical standards officer, to the provisions of regulation 5 of the Case Tribunals (England) Regulations 2008, a party may give notice of the withdrawal of its case, or any part of it—*
> *(a) by sending or delivering to the Tribunal a written notice of withdrawal; or*
> *(b) orally at a hearing.*
> *(2) Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.*
> *(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.*
> *(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—*
> *(a) the date on which the Tribunal received the notice under paragraph (1)(a); or*

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).

(5) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule.

16. The case of *Waldman v Charity Commission* (hearing dated 19.8.19) illustrates the operation of GRC rule 17.
charity.decisions.tribunals.gov.uk/documents/decisions/Directions%20(20%20August%202019).pdf
An appeal had been brought against the making by the Charity Commission of a temporary freezing order. Subsequently, the order was revoked by the Commission following receipt of further financial information from the appellant. At a preliminary hearing, the appeal was withdrawn by the appellant giving notice under GRC rule 17(1). (A restricting order had been made subsequent to the freezing order however, and the appeal against that order was to continue.)

17. An appellant may however choose not to give notice under GRC rule 17(1) of withdrawal of the appeal, for whatever reason. One case is *A v The Pensions Regulator* (decision dated 16.4.19). The appellant had challenged a fixed penalty notice ("FPN") (for failure to comply with an Unpaid Contributions Notice – "UCN"). The FPN had been issued to an apparent entity which was not the legal name of the person to whom it was intended to be issued. Following the appellant referring the matter to the Tribunal, the regulator revoked the FPN and stated that a replacement UCN would be issued. The regulator invited the appellant to withdraw his appeal, but he did not wish to do so. As a result, a hearing had to be listed.

18. As to why the appellant had not withdrawn the appeal, in correspondence he had referred to seeking costs and compensation from the regulator; and he explained at the hearing that he had wanted to attend to explain how difficult the matter had been for him as a small employer with no access to human resources advice. If the appellant had been legally represented, he would no doubt have been advised to withdraw his appeal under GRC rule 17(1). But he was entitled to insist on his 'day in court'. The outcome was a reasoned decision that if the FPN

had still been in existence, it would have been quashed as it was addressed to a non-existent legal entity, and the appeal was allowed.

Non-opposition to the appeal

19. If the appeal is not opposed by the regulator, the only way forward presently within the GRC Rules, in the absence of a consent order, is to make a (reasoned) decision on the appeal. Further, such a decision cannot be made on the papers unless both parties agree (under GRC rule 32). Otherwise, it must be listed for hearing. One case is *B v Registrar of Approved Driving Instructors* (decision dated 25.6.19). It concerned an appeal against removal from the register on 'fit and proper person' grounds, following a driving conviction. However, the conviction was subsequently set aside, and the appeal was not opposed. There was nevertheless required to be a determination on the papers, allowing the appeal. A similar course was taken in *Ghani v Registrar of Approved Driving Instructors* (decision dated 23.10.18). transportappeals.decisions.tribunals.gov.uk//judgmentfiles/j2167/Ghani,%20Tanveer%20D-2018-301.pdf

20. There may be reasons why non-opposition to the appeal is not the course taken. In the *A v The Pensions Regulator* case, the regulator had chosen to defend the appeal, on a ground of principle. It contended that the FPN had been correctly issued (since there had been no evidence of compliance with the earlier UCN) and that there was now no remedy for the Tribunal to give, as the FPN no longer existed.

Consent Order

21. The terms of a proposed consent order may not be capable of being agreed; and a consent order may not be proposed timeously. In the *B v Registrar of Approved Driving Instructors* case, the Tribunal had been informed by both parties of their agreement that the appeal be determined on the papers. The following day, it was so determined, in Chambers. However, the appellant's solicitors had not understood the 'determination on paper' procedure, instead repeatedly querying

whether they or the appellant should attend a hearing, then sending to the Tribunal a draft consent order and a (non-compliant) costs schedule. The purpose of a consent order, timeously proposed and agreed, is to remove the need for a (reasoned) decision on the appeal. The draft consent order was too late.

Strike out of the appeal under GRC rule 8

22. It may not follow from a decision being revoked/withdrawn that the appeal is susceptible to being struck out. In the *A v The Pensions Regulator* case, such an application was made by the regulator but was refused by the Tribunal.

23. We turn to particular jurisdictions in which the issues arising from revocation/withdrawal of a decision have been raised.

Pensions Regulator

24. The Pensions Regulator was the regulator in the *A v The Pensions Regulator* case. Sections 43 and 44 of the Pensions Act 2008 illustrate a statutory basis for a review of a decision.

    Section 43 states:
    Review of notices
    (1) The Regulator may review a notice to which this section applies—
    (a) on the written application of the person to whom the notice was issued, or
    (b) if the Regulator otherwise considers it appropriate.
    ….
    (6) The Regulator's powers on a review include power to—
    (a) confirm, vary or revoke the notice;
    (b) substitute a different notice.

    Section 44 states that a '*person to whom a notice is issued ….*' may make a reference to the Tribunal if either:
    (i) there has been a completed review under section 43; or

(ii) the person to whom the notice was issued had applied for a section 43(1)(a) review and the Regulator has determined not to carry one out.

25. Regulation 15(2) of the Employers' Duties (Registration and Compliance) Regulations 2010 states: *The period within which a notice may be reviewed under section 43(1)(b) of the Act (review by the Regulator) is 18 months, starting from the day a notice is issued to a person.*

26. Hence, if there is a 'voluntary' review under section 43(1)(b), and this happens during the currency of a reference it logically can only happen after there has earlier been a review (sought by the appellant) which has been completed or refused. (That may naturally limit in itself the scope for review decisions revoking an earlier decision which is under appeal/reference.)

27. One point from the *A v The Pensions Regulator* case is that it might be thought questionable whether the appellant was a '*person to whom a notice is issued'*, given that the FPN had been issued to an apparent entity which was not the legal name of the person to whom it was intended to be issued. Be that as it may, one or other of the conditions under section 44 had been determined or treated as applying at the time the appeal was initiated; there was no 'jurisdictional' point to be taken as arising therefrom.

28. In the event, a satisfactory outcome was achieved for the appellant on the appeal itself (leaving aside his expressed frustrations), but at considerable use of GRC resources. It is understood that following the *A v The Pensions Regulator* case, the policy of the regulator has changed to not opposing the appeal in circumstances similar to those which had occurred in that case.

Charity Commission

29. The Charity Commission was the regulator in the *Waldman* case. A relevant link is ogs.charitycommission.gov.uk/g736a001.aspx Clicking on the "OG Contents" tab leads to an explanation of 'decision review'. It appears to be the case that a party can ask for a decision review regardless of its right to approach the

Tribunal. Thus, apart from the decisions specifically mentioned (consents to a charity), there is scope for 'decision review' to be undertaken during the currency of proceedings. That appears to have been what happened in the *Waldman* case. It is understood that the GRC will frequently stay an appeal if a 'decision review' is being undertaken, and that a prospective appellant will be encouraged to make a protective application to the Tribunal even if there is to be a decision review, so that they do not find themselves 'out of time' as regards the original decision should it be unchanged.

30. It is understood that there have been few charity cases raising issues concerning revocation/withdrawal of decisions, but it is believed that this is likely to happen more often as the Commission has been given greater powers and is increasingly making protective orders, for example freezing bank accounts, which it might then agree to discharge before an appeal hearing.

Registrar of Approved Driving Instructors

31. The Registrar of Approved Driving Instructors was the regulator in the *B v Registrar of Approved Driving Instructors* and *Ghani* cases. The Road Traffic Act 1988 deals with removals from the register (in section 128). There is no provision in the Act for revocation/withdrawal of such a decision, and the Registrar simply chose not to oppose the appeals.

Food Standards Agency

32. It is understood that the Food Standards Agency ("FSA") also, on occasion, revokes/withdraws decisions. For example, relevant legislation may permit "*withdrawal or variation*" of an enforcement notice issued by the FSA, as in Regulation 6 (Enforcement notices) of the Mandatory Use of Closed Circuit Television in Slaughterhouses (England) Regulations 2018 (the "CCTV Regulations").

33. It is understood that issues concerning a revoked/withdrawn decision have arisen in two FSA cases (there are only a few FSA cases a year in any event). In a recent case (*C v Food Standards Agency* – decision dated 6.12.19), the Tribunal received extensive submissions from the FSA, contending that the withdrawal of an enforcement notice ('EN') served under the CCTV Regulations had deprived the Tribunal of jurisdiction to determine the appeal against it. The appellant had argued that there were potential adverse consequences if the EN was not cancelled by the Tribunal: the fact that the EN had been served remained on the appellant's 'enforcement record'. The FSA's submission as to jurisdiction was rejected, by a Decision and Directions (without a hearing) which extended over 10 pages. The appeal was directed to proceed to a full hearing.

Possible amendment of the GRC Rules

34. If a decision is revoked/withdrawn by the decision-maker while it is under appeal in the GRC, and it is considered that the appeal should be disposed of, administratively, at minimal cost and inconvenience, then how might that be achieved by amendment of the GRC Rules?

35. There is a precedent in The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (the "IAC Rules"), which contain the following IAC rule 17 (with emphasis in bold):

Withdrawal

17.—(1) A party may give notice of the withdrawal of their appeal—
(a) by providing to the Tribunal a written notice of withdrawal of the appeal; or
(b) orally at a hearing, and in either case must specify the reasons for that withdrawal.
(2) ***The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn and specifies the reasons for the withdrawal of the decision****.*

(3) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule and that the proceedings are no longer regarded by the Tribunal as pending.

36. The following may be noted:
    (i) Under IAC rule 17(1), reasons for withdrawal must be specified by the appellant, if a withdrawal notice is given; that is not a requirement of GRC rule 17(1).
    (ii) Under IAC rule 17, there is no right to apply for reinstatement of an appeal that has been withdrawn by the appellant; there is such a right under GRC rule 17(3).
    (iii) Under IAC rule 17, there is no right to apply for reinstatement of an appeal that has been treated as withdrawn under IAC rule 17(2).

37. The genesis of IAC rule 17 in its current form is considered instructive, and is now set out.

38. The IAC Rules were made following a TPC Consultation in 2013 (the "IAC Consultation"), accompanied by draft IAC Rules. The IAC Consultation noted that the draft of IAC rule 17 followed the form used in other Chambers.

39. Draft IAC rule 17(1) was materially the same as that made, save that the words "*and in either case must specify the reasons for that withdrawal*" were absent, and it commenced '*Subject to paragraph (4) …* '. Draft IAC rule 17(1) also accorded with rule 17(1) of The Asylum and Immigration Tribunal (Procedure) Rules 2005 (being the procedure rules then in place):

    Withdrawal of appeal
    17.—(1) An appellant may withdraw an appeal—
    (a) orally, at a hearing; or
    (b) at any time, by filing written notice with the Tribunal.

(2) An appeal shall be treated as withdrawn if the respondent notifies the Tribunal that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn.

40. There was however (in draft IAC rule 17(2)) a right to apply to reinstate a withdrawn appeal. As has been noted above, such a provision is absent from IAC rule 17 as made.

41. The draft of what became IAC rule 17(2) was as follows.

(4) The Tribunal may treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn.

42. Thus, an equivalent to rule 17(2) of The Asylum and Immigration Tribunal (Procedure) Rules 2005 had been proposed by the TPC, but with an adjustment: the Tribunal '*may*' treat an appeal as withdrawn instead of '*shall'* treat it as withdrawn. The IAC Consultation explained that the purpose of the proposed change was to allow the Tribunal to continue to resolve an appeal where the original decision had been withdrawn, but had been replaced with one that the appellant wished to challenge on similar grounds to the existing appeal. In some cases, continuing to resolve the existing appeal would be more efficient for both parties and the tribunal than requiring a fresh appeal of the new decision.

43. The Reply by the TPC to the IAC Consultation (the "IAC Consultation Reply") explained the reasoning behind the drafting of IAC rule 17(2) as it was made (see above). Extracts from that Reply are found in the Appendix to *Waseem Anwar v Secretary of State for the Home Department* [2019] UKUT 00125 (IAC), and they are set out in the Annex to this Consultation.

44. We bear in mind those passages, as set out in the Annex, in turning now to some issues of principle which arise in connection with an adoption of the precedent of IAC rule 17(2) to the GRC Rules. These issues are linked, to some degree.

Application for reinstatement

45. Under GRC rule 17(3), a party may apply to reinstate their case after they have given notice of its withdrawal. That is not the case in the IAC (as regards an appellant), for reasons explained in the IAC Consultation Reply – see above.

46. In the GRC, if proceedings were to be treated as withdrawn following notification of the revocation/withdrawal of a decision, there would appear to be no sound reason not also to permit an application to be made for reinstatement of the proceedings. That would be fair to an appellant in particular, since the notification which led to the proceedings being treated as withdrawn was not that of the appellant (as with giving notice of withdrawal under GRC rule 17(1)), but that of the respondent.

47. As such, we propose including a right to apply to reinstate proceedings which had been treated as withdrawn following notification of a revoked/withdrawn decision.

Should reasons for the revocation/withdrawal of a decision be a specified requirement in the GRC Rules?

48. It will be noted that reasons are required to be specified in IAC rule 17(1), and they are not required by GRC rule 17(1), nor by any other equivalent rules made by the TPC. Nor had such requirement appeared in the draft of IAC rule 17(1). The IAC Consultation Reply reviewed responses received, describing what might be termed circumstances of ‘mutual mistrust’ between the Home Office and those responding from the appellants’ point of view.
    (i) Some respondents expressed concern about ‘tactical’ Home Office withdrawals of decisions, rendering them ‘improper’.
    (ii) The Home Office in turn was concerned that in some cases a withdrawal of an appeal might be tactically made, with a view to later applying for reinstatement.

49. As seen above, IAC rule 17(2) as made requires notice of the withdrawal of an underlying decision to be accompanied by the reasons for that withdrawal. The IAC Consultation Reply stated: "*The TPC anticipates that this will encourage compliance with the Home Office policy, and allow the TPC to monitor the nature of withdrawals*." Home Office policy was set out in paragraph 67 of the IAC Consultation Reply.

50. We return to the requirement to give reasons in IAC rule 17(1) as made. This may naturally be seen as reflecting a degree of mutuality of obligation, arising from the matters discussed in the IAC Consultation Reply.

51. It maybe thought unnecessary in the GRC Rules for the decision-maker to be required (as in IAC rule 17(2)) to provide reasons for the revocation/withdrawal of its decision.

    (i) There is no obligation on an appellant to provide reasons for a withdrawal of the appeal, as that is considered unnecessary in the GRC and all other Chambers save for the IAC.
    (ii) There is no element of compliance with any 'policy', across numerous regulators, which needs to be encouraged (by provision of reasons for revocation/withdrawal of a decision).
    (iii) The TPC would have no plan to monitor the nature of revocations/withdrawals of decisions, as regards any regulator in particular or generally.
    (iv) If there is, in the GRC, to be a right to apply for reinstatement of an appeal which is treated as withdrawn, this removes a justification for the specified need for reasons in IAC rule 17(2), as discussed in the IAC Consultation Reply.

52. Further, in the IAC there are usually only two types of respondent, the Home Office and Entry Clearance Officers. These may be termed 'Civil Service' operations, with the ability to generate standard forms which are required to be used, therefore encouraging staff to provide all the information required by the

Rules. With the GRC however, there are very many different regulators, varying in resources and in experience of working with the GRC Rules.

53. It would be expected that, usually, the GRC would receive reasons, but it might be considered preferable not to make provision of reasons a potential barrier to efficient disposal of an appeal which is, ultimately, a waste of public resources because the parties will be agreed on the outcome – the decision appealed against will be of no effect. If reasons were a stipulated requirement, and were not initially provided by a regulator, an additional GRC resource would be spent on requiring the regulator to provide them, which may be a pointless and wasteful exercise.

54. For the GRC, "*save for good reason"*, as used in IAC rule 17(2), might be regarded as sufficient to achieve the purpose of seeking to dispose of appeals in these cases with efficiency. A simple notification by a respondent that a decision has been revoked/withdrawn in most cases would lead to the appeal being treated as withdrawn. However, there would remain a discretion not to do so, if there appeared to be a good reason not to take that course. Further, the appellant would have the right to apply to have the appeal reinstated, if it was treated as withdrawn.

55. There may be a counter view, however. If reasons had to be provided, the Tribunal might be informed of a statutorily based revisiting of the decision, as opposed to there simply having been a 'reconsideration'. Or it might, for example in the Charities jurisdiction, be explained that there had been a discharge of a freezing order. It should not be difficult for a regulator to provide reasons, and if there was an application to reinstate an appeal then the reasons earlier provided might be of value at that stage too.

56. Further, if the words '*save for good reason*' are used, that might suggest that there ought in theory to be something in the notification that might possibly provide a 'good reason' not to deem the appeal withdrawn. That 'something' might be found in reasons required to be provided.

57. In light of the matters discussed above, an amendment to GRC rule 17 is proposed, as outlined below.

58. First, GRC rule 17(1) commences:

Subject to paragraph (2), and, in the case of a withdrawal of a reference from an ethical standards officer, to the provisions of regulation 5 of the Case Tribunals (England) Regulations 2008, a party may give notice of the withdrawal of its case …

59. The Case Tribunals (England) Regulations 2008 were repealed in 2012. (The relevant jurisdiction of the Tribunal was abolished by the Localism Act 2011.)

60. Given the above, proposed changes for GRC rule 17 (by indicative drafting) are as follows, and by reference to the issues of principle (see above).

17.—(1) Subject to paragraph (2), [….][1] a party may give notice of the withdrawal of its case, or any part of it—
(a) by sending or delivering to the Tribunal a written notice of withdrawal; or
(b) orally at a hearing.
(2) Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.
(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
(a) the date on which the Tribunal received the notice under paragraph (1)(a); or
(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).
(5) The Tribunal must notify each party in writing that a withdrawal has taken effect under ***[…[2]] paragraph (2).***

[1] Deleting the content concerned with withdrawal of a reference from an ethical standards officer, and the 2008 Regulations
[2] Deleting 'this rule'.

(6) The Tribunal must (save for good reason) treat the proceedings as withdrawn if the respondent provides notification in writing to the Tribunal and each other party that the decision or act to which the proceedings relate has been withdrawn or revoked [and specifies the reasons for the withdrawal or revocation], or that the respondent otherwise does not rely upon the decision or act.

(7) For the purposes of paragraph (6) "decision or act" includes a direction or order, and means, where the proceedings relate to more than one decision or act, all of the decisions or acts.

(8) The Tribunal must notify each party in writing that the proceedings have been treated as withdrawn under paragraph (6).

(9) A party may apply to the Tribunal for proceedings which have been treated as withdrawn under paragraph (6) to be reinstated.

(10) An application under paragraph (9) must be made in writing and be received by the Tribunal within 28 days after the date on which the Tribunal sent the notice under paragraph (8).

61. It will be seen that specification of reasons for withdrawal/revocation is in parentheses, as this is a matter upon which we seek views.

62. We turn now to some drafting issues.

"decision or act"

63. The IAC Rules use the word "*decision*", which is appropriate for its jurisdiction. However, in the GRC proceedings may relate to a decision or act, or a failure to decide or act.

64. In virtually all cases, it is a decision or act which gives rise to the proceedings. For example, in the CCTV Regulations, the service of an enforcement notice ('EN') is followed by a completion notice ('CN') if the inspector is satisfied that the steps specified in the notice to remedy the contravention have been taken. If the inspector is not so satisfied, then a decision must be made, within a specified period, <u>not</u> to serve a completion notice and instead to serve a notice giving

reasons for the decision ('Notice of Reasons'). Such a decision may be appealed. In the *C v Food Standards Agency* case, the appeal was against the EN, not against a decision not to serve a CN. (In fact, it appears that no 'decision' had been made by the inspector in relation to a CN or a Notice of Reasons. The EN was under appeal, and no steps at all had been taken to remedy the contravention.) It should also be noted however that section 319 of the Charities Act 2011 provides for an appeal against "any decision, direction or order" mentioned in column 1 of Schedule 6 to that Act.

65. An example, however, of a failure to act giving rise to proceedings is an application being made to the Tribunal under section 166 of the Data Protection Act 2018 (orders to progress complaints). It is possible that after a person has applied to the Tribunal for such an order the Commissioner does take steps to progress a complaint. It might be supposed that the proceedings have then lost their substance, and ought to be capable of being disposed of in a similar fashion to that proposed by the indicative drafting (see above).

66. The TPC considers that the use of the phrase "*decision or act*" alone is appropriate, subject to confirmatory drafting that it includes a direction or order. It is not intended that the proposed amendment to GRC rule 17 be applicable to 'failures to act', or 'failures to decide'. Such cases are not those which the proposal addresses. Rather, the proposal addresses decisions or acts by regulators which are under appeal.

"withdrawn or revoked"

67. The word '*withdrawn*' follows that used in the IAC Rules. As seen above, the CCTV Regulations also provide for '*withdrawal*' of a decision.

68. In the *A v The Pensions Regulator* case the regulator '*revoked*' the FPN: the regulator's powers on a review include power to—*(a) confirm, vary or revoke the notice; (b) substitute a different notice*.

69. With the driving instructor cases, there does not appear to be any statutory regime for 'withdrawal' or 'revocation' of the decision. Indeed, with other

jurisdictions with which we are concerned there may not be a statutory basis for a 'withdrawal' or 'revocation'. Generally, there might be a 'reconsidered' decision, or a 'revised' decision, or simply an intended (and stated) non-reliance on a decision. The Charity Commission website (see above) states that there are three possible outcomes of decision reviews (other than reviews of representations following the publication of a draft Order or Scheme): "*The original decision is upheld; The original decision is partially upheld or varied; The original decision is overturned*."

70. A 'varied' decision requires consideration. The variation may be sufficient to remove the entire purpose of the appeal, but it may not. The regulator would want to rely on a varied decision, but not any aspects that have fallen away as a result of the variation. So long as part of the substance of the decision remains, it cannot be said that "all of the decisions or acts" have been revoked or withdrawn. It would be a matter for the regulator, in giving a notification under the proposal, to satisfy itself that it is appropriate to be given in light of a 'varied' decision.

"the respondent otherwise does not rely upon the decision or act."

71. The words "*the respondent otherwise does not rely upon the decision or act*" are intended to recognize that there may be possibilities outside formal revocation/withdrawal of a decision or act which ought to have the consequences intended by the proposal. If a regulator decides not to oppose an appeal, then (in substance) it does not rely upon the decision or act to which the proceedings relate.

Information Commissioner's Office

72. In considering the above indicative drafting, attention is drawn to the Information Rights jurisdiction in the GRC. There, section 57 of the Freedom of Information Act 2000 provides for appeals against notices served by the Information Commissioner ("the Commissioner") under Part IV of that Act. Under section 58, the Tribunal may make a substituted Decision Notice ("DN") if it allows the appeal.

58 **Determination of appeals**.

(1) If on an appeal under section 57 the Tribunal considers—
(a) that the notice against which the appeal is brought is not in accordance with the law, or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

73. The work of the Commissioner is, in general, undertaken by the Information Commissioner's Office (the "ICO"). If the ICO does not wish to resist the appeal, it usually suggests the terms of a substituted DN and the Tribunal considers that suggestion: the ICO does not 'revoke' or 'withdraw' the DN as such, as it is considered there is no legal power so to do. A proposed substituted DN may not be determinative however, as the public authority and the appellant may take a different view.

74. The appeal has however to be allowed in order for there to be the substituted DN. That is the only way the tribunal has jurisdiction to give its own substituted DN (see *IC v Malnick and ACOBA* [2018] UKUT 72 (AAC)[3], para 104). The analysis below was approved.

"We can only make sense of s 58(1) by interpreting the word "or" disjunctively in the context of appeals by public authorities and conjunctively in the context of appeals by applicants for information. In other words, we construe the subsection as if it read: "the Tribunal shall allow the appeal and/or substitute such other

[3] This case also dealt with the particular role of the ICO under section 50 of the Act. When a DN was issued, the ICO then became *functus officio*. There was no statutory power to withdraw or amend the DN. There could be no 'revocation' of the DN (see paras 81, 85).

notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal."

75. Thus, although the phrase "*or that the respondent otherwise does not rely upon the decision or act*" in the suggested new GRC rule 17(6) might be supposed to be engaged if the ICO proposes a suggested substituted DN (in the sense that the ICO does not 'rely' on its own DN), in these cases, the Tribunal would not treat the appeal as withdrawn, since it would have (very) "*good reason*" not to: it would have to proceed to allow the appeal since only upon so doing could the Tribunal substitute the DN.

76. If all parties agree on the outcome (i.e. fully substituted DN), then it would be anticipated that the ICO would be proactive in sending terms of consent to the other parties and thereafter enabling the appeal to be dealt with by a consent order.

Generally

77. The benefit of the proposal to amend GRC rule 17 would be that no decision would have to be made on the appeal (still less would there need to be a hearing). The onus would be on the appellant to apply for reinstatement, if they were not content that the appeal be treated as withdrawn. There may not be many applications for reinstatement.

78. On treating the proceedings as withdrawn, the Tribunal would no doubt in its notification explain why it has done so, and perhaps refer to the proportionate use of the Tribunal's resources. The notification might also include wording along the lines: "*this means that the regulator's decision [identified usually by reference number and date it was made] will not be enforced ….. any issue of costs should be dealt with in accordance with rule 10*". The appellant would then understand that they do not need their 'day in court' to seek costs; this would also emphasise that the respondent's action can mean that the whole appeal ends.

79. The appellants affected by the proposed changes to GRC rule 17 would likely be members of the public who may want their 'day in court' regardless of the futility

of a continued appeal; they may want to ventilate their unhappiness (as in *A v The Pensions Regulator*), and with an opponent to hear it. However, any application for reinstatement may not be acceded to, and the case would be over.

80. There is no absolute principle of a party having an entitlement to their 'day in court'. Rules may properly limit this. The terms of TCEA section 22(4) are set out in paragraph 3 above. Doing justice does not require that a hearing take place if one is, objectively, unnecessary. There is no reason to suppose that the operation of proposed rule 17 would not be fair; an appellant may apply to reinstate an appeal, thereby maintaining accessibility to the tribunal system. The proposal enhances the ability of the GRC to handle the proceedings quickly and efficiently, and hence facilitate doing justice more quickly for other Tribunal users too.

Consultation Questions

81. The TPC is interested to receive your views on the possible changes to GRC rule 17. When responding, please keep in mind that the rules should be simple and easy to follow. They should not impose unnecessary requirements or unnecessarily repeat requirements that are contained elsewhere. The TPC must secure the objectives set out in section 22(4) of the TCEA and it aims to do so in a consistent manner across all jurisdictions. Where your views are based upon practical problems which do or could arise, the TPC would be assisted by reference to relevant evidence.

82. In general, the TPC regards consultation responses as public documents. They may be published by the TPC and referred to in its Reply to the Consultation.

83. If you would prefer your response to be kept confidential, you should be aware that information you provide, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. These are primarily the Freedom of Information Act 2000 and the Data Protection Act 2018.

84. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, by itself, be regarded as binding on the TPC.

85. The questions raised are as follows.

Question 1: Do you agree that it is appropriate to amend GRC rule 17 in the way proposed? If not, why not?

Question 2: Do you have any comments on the indicative drafting proposal?

Question 3: In particular, do you have a view as to whether or not reasons should be required to be provided by the respondent for its revocation/withdrawal of a decision?

Question 4: Do you have any further comments?

How to Respond

Please reply using the response questionnaire template.

Please send your response by 11 August 2020 to:
The Secretary, Tribunal Procedure Committee
Post point 10.18, 102 Petty France
London SW1H 9AJ

Email: tpcsecretariat@justice.gsi.gov.uk
Fax: 020 3334 2233

Extra copies of this consultation document can be obtained using the above contact details or online at: www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee/ts-committee-open-consultations

ANNEX

to Consultation on possible changes to the First-tier Tribunal (General Regulatory Chamber) Rules 2009 in connection with withdrawals of appeals

See paragraph 43 of the Consultation. The Reply by the TPC to the IAC Consultation (the "IAC Consultation Reply") explained the reasoning behind the drafting of IAC rule 17(2) as it was made. Extracts from that Reply are set out below.

> ***"(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."