Tribunal Procedure Committee

Consultation on Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to Tribunal Reform

Introduction

1. The Tribunal Procedure Committee ("TPC") is the body that makes rules to govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. It is an independent Non-Departmental Public Body, sponsored by the Ministry of Justice. Information on the TPC can be found at: www.gov.uk/government/organisations/tribunal-procedure-committee

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.

The First-tier Tribunal and the Upper Tribunal

6. The TCEA provides for the First-tier Tribunal and the Upper Tribunal. Both are independent Tribunals. The First-tier Tribunal is the first instance Tribunal for most jurisdictions.

7. The First-tier Tribunal is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills.

8. The First-tier Tribunal Chambers are:
   a) Social Entitlement Chamber,
   b) Health, Education and Social Care Chamber,
   c) War Pensions and Armed Forces Compensation Chamber,
   d) General Regulatory Chamber,
   e) Immigration and Asylum Chamber,
   f) Tax Chamber; and
   g) Property Chamber.

9. The First-tier Tribunal (Immigration and Asylum Chamber) (the 'IAC') is responsible for deciding appeals against some decisions made by the Home Office relating to permission to stay in the UK, deportation from the UK and entry clearance to the UK. It also deals with applications for immigration bail from people being held by the Home Office on immigration matters. Further information on the IAC can be found at:

   https://www.gov.uk/courts-tribunals/first-tier-tribunal-immigration-and-asylum

10. The Upper Tribunal (Immigration and Asylum Chamber) (the 'Upper Tribunal (IAC)') deals with appeals against decisions made by the IAC and with judicial reviews of certain decisions made by the Home Office relating to immigration, asylum and human rights claims. Further information on the Upper Tribunal (IAC) can be found at:

    https://www.gov.uk/courts-tribunals/upper-tribunal-immigration-and-asylum-chamber

Immigration Tribunal Rules

11. The procedural Rules that apply in the IAC are the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ('the IAC Rules'); those which apply in the Upper Tribunal (IAC) are the Tribunal Procedure (Upper Tribunal) Rules 2008 (the 'Upper Tribunal Rules').

12. The current IAC Rules and Upper Tribunal Rules can be found at:

https://www.gov.uk/government/publications/immigration-and-asylum-chamber-tribunal-procedure-rules

https://www.gov.uk/government/publications/upper-tribunal-procedure-rules

The Reform Programme and Core Case Data

13. Like other Tribunals, the IAC and Upper Tribunal (IAC) will be affected by the overall programme of reform announced by the Lord Chancellor, Lord Chief Justice and Senior President of Tribunals in 2016.

14. As part of this exercise, the IAC began running a pilot in some of its venues in January 2019. Broadly, this pilot involved:

    a) revision of the process of appeal and response, in order to establish more clearly the issues between the parties prior to the hearing,
    b) greater use of Tribunal Caseworkers, with enhanced delegated powers, to manage case progression, and
    c) listing of cases only once a Tribunal Caseworker has concluded that the matter is ready to be considered by a Judge.

15. The pilot also involved the development of an online system for managing appeals within the IAC, known as Core Case Data ('CCD'). CCD allows appeals to be lodged and managed online. Communications from the Tribunal can be produced and served electronically. Parties are able to upload evidence and other documents into the same online system.

16. CCD can be used by the Tribunal and the Home Office, even if an Appellant is unable, for whatever reason, to operate an online system. Appellants will retain the option of paper correspondence with the Tribunal. HMCTS staff will then scan material sent by post into the digital system for use by the Tribunal staff, Judge and Home Office.

17. In brief, the aim of the CCD approach is to ensure that, before a case reaches a hearing before a judge, both parties give careful thought to what issues are in dispute, reach agreement as to what the disputed issues are and have prepared so that they are ready to argue the substantive appeal. It is hoped this will avoid a number of common problems within the jurisdiction, including:

    - Appeals being conceded shortly before, or at, a substantive hearing. Although sometimes this will be necessary or appropriate, it is better for all parties, and a more efficient use of the Tribunal's resources, for an appeal to be conceded at the earliest possible opportunity.
    - Difficulty in preparing appeals when it is not clear what issues are in dispute, leading to inadequate or inefficient preparation. Parties spend significant time and resources preparing argument on evidence on points that are ultimately irrelevant because they are not disputed.
    - Unnecessary time spent at substantive hearings clarifying the issues, rather than resolving the case, or time wasted in presenting evidence and argument unnecessarily.
    - Excessive adjournment of hearings, because parties are not ready to deal with the relevant issues or because too much time is taken dealing with preliminary points so that the hearing cannot be completed in the remaining time available.

18. The pilot was ongoing at the point that the COVID-19 pandemic began to affect the Tribunal system. In response, the President of the IAC significantly expanded the use of the new approach represented by the pilot and CCD to allow the Tribunal to continue dealing with cases during the pandemic and to facilitate the use of online hearings while face to face hearings were difficult or impossible.

19. A Presidential Guidance Note was issued on 23rd March 2020, indicating that all appeals other than Human Rights and European Economic Area appeals should be commenced using the online procedure, unless it was not possible to do so.

20. This was followed by a Presidential Guidance Statement, that came into effect from 22nd June 2020. This further expanded the use of the CCD procedure. It required all appeals to be lodged via CCD, unless it was not practicable to do so. It also set out circumstances where it would be

deemed not to be reasonably practicable to lodge the appeal using CCD. These were where the appeal:

a) Was brought under The Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020;
b) Involved an Appellant outside the UK;
c) Involved an Appellant in detention;
d) Was brought by a Litigant in Person; or
e) Was linked to another appeal.

21. The Presidential Guidance Statement remains in use and can be found at:

https://www.judiciary.uk/publications/immigration-and-asylum-tribunal-chamber-presidential-practice-statement-note-covid-19-pandemic/

22. These developments have meant that there has been much more significant use of CCD and of the new approach than would normally have occurred during a pilot. Both HMCTS and the IAC judiciary regard the CCD approach as a significant procedural improvement. They believe that it has already met many of the aims of the reform programme, despite the difficult circumstances in which it has been implemented. In particular, more decisions are withdrawn by the Home Office prior to a hearing and, in general, parties are better prepared to deal with the substantive issues at the hearing.

23. HMCTS therefore intends to continue to operate CCD and, in due course to further extend its use to those categories of cases that remain outside its current scope.

24. Significant parts of CCD involve the use of new technology and revised working methods that do not involve changes to the IAC or Upper Tribunal Rules. These are therefore not matters for the TPC, which is concerned only with the Rules. There are, however, areas where rules changes will become necessary or desirable. These proposed changes are the subject of this consultation.

Legal aid

25. A key issue in the implementation and take up of the new approach is likely to be the provision of and arrangements for legal aid in cases before the Tribunal.

26. An initial difficulty with the piloted approach was that the payment of legal aid was closely linked to the substantive hearing of an appeal. Lawyers were paid for representation at hearings, on the basis that this payment would also cover the other work required on an appeal. As noted above, the piloted approach is intended a) to require significant work at an early point in proceedings and b) to reduce the number of appeals that proceed to a hearing. This is likely to be problematic when funding is based on hearings, both by placing financial pressure on lawyers and by creating inappropriate incentives that run contrary to the intention of the CCD approach.

27. Initially, changes to the legal aid regime were made by the Civil Legal Aid (Remuneration) (Amendment) (Coronavirus) Regulations 2020. These regulations were the subject of an application for judicial review which was resolved by a consent order. The regulations were then replaced by the The Civil Legal Aid (Remuneration) (Amendment) (No. 2) (Coronavirus)

Regulations 2020. These currently allow for work within the IAC to be remunerated on an hourly rates basis.

28. The Ministry of Justice is expected to begin a consultation on legal aid funding within the IAC in 2021.

29. The TPC is not responsible for the provision of legal aid and has no part in that decision-making process. Nevertheless, any decisions about procedure and rules must consider the context in which they operate. That includes the funding arrangements for cases and legal aid. The TPC therefore welcomes responses to this Consultation that are informed by experience of the current legal aid arrangements. The TPC will not, however, be able to consider suggestions for changes or reform to the legal aid funding arrangements, since, as noted above, these are outside its perview.

Core Case Data Proposed Changes

Revised appeal and response process

30. Under CCD, the process of an Appellant beginning an appeal, and the Home Office responding to it, has significantly changed. The previous process of an Appellant initiating an appeal, which is then responded to by the Home Office, at which point a hearing is listed, has been replaced with a multi-stage approach, as follows.

31. The Appellant initiates the appeal, but is not required to set out their grounds in detail at that stage. Instead, they only indicate which of the available statutory grounds of appeal they rely upon.

32. Upon receiving an appeal, the Home Office must, within 14 days, provide the Tribunal with the notice of decision being challenged, together with relevant evidence. At this stage, if the Home Office wishes to change or add to the grounds or reasons for its decision, it must do so by providing a statement in writing setting out the basis of their opposition to the appeal.

33. Once this response has been provided, the next step will depend on whether the Appellant is a Litigant in Person ("LiP") or represented.

34. A represented Appellant must provide an Appeal Skeleton Argument ('ASA'). The ASA must summarise their case and contain a Schedule of Issues, in addition to submissions. Guidance on the content and form of the ASA is currently contained in Annex 1 to Presidential Practice Statement No 2 of 2020. It is expected that, if CCD is extended, similar guidance will be given in a Practice Direction. Where an ASA relies on additional evidence, not included in the material provided by the Home Office, this should be provided with the ASA. The ASA is reviewed by a Tribunal Caseworker to ensure that it complies with the Practice Direction. If an ASA does not comply with the guidance, the Tribunal Caseworker will make appropriate case management orders, such as requiring the ASA to be revised or a supplementary document filed. If necessary, they may invite both parties to a case management appointment, either face to face or by telephone, to resolve the issue.

35. A LiP is not required to provide an ASA. Instead, they are asked to set out, in their own words 'why the Home Office decision was wrong'. An online free text box is provided for them to

explain their position and they are able to upload any accompanying evidence. A caseworker then reviews the LiP's submission. They may send the Appellant clarifying questions in order to ensure that the case has been set out sufficiently clearly. If necessary, they may invite both parties to a case management appointment, either face to face or by telephone, in order to better understand the Appellant's case.

36. Once they receive the Appellant's response, the Home Office is required to review the case, taking into account the Appellant's ASA (or the LiP's submission) and any documents provided.

37. The result of this review must be sent to the Tribunal within 14 days. It must engage with the substance of the Appellant's ASA and list of issues. If the Home Office does not agree with the Appellant's schedule of issues, the result of the review should include a Counter Schedule of Issues. The Counter Schedule must indicate which issues are conceded and which remain in issue. If the Home Office believes that there are additional issues, not included in the original Schedule, these must be set out.

38. This process is supervised and actively case managed by the Tribunal Caseworkers. Documents that do not comply with the requirements — for example that fail to engage with the substance of the other side's arguments — will not be accepted and must be revised.

39. A substantive hearing is only listed once the Tribunal Caseworker is satisfied that the issues have been clearly identified and the case is ready to be heard.

40. It is hoped that this revised process will have two main advantages over the current practice, both stemming from the fact that it should clarify both parties' positions and the evidence that they rely on before a hearing is listed. First, cases that are bound to succeed (for example, because compelling evidence has been produced as part of the appeal) will be identified more quickly, rather than proceeding to an unnecessary hearing. Second, in those cases that do proceed to a hearing, clarity about the issues in dispute and the evidence relied upon will allow more focused and effective hearings.

Proposed rule changes

41. The TPC is considering the following rules changes to the IAC Rules to implement the CCD approach.

Rule 19: Notice of Appeal

42. First, to amend IAC Rule 19(4) to replace the requirement to 'set out the grounds of appeal' with a requirement to identify the statutory ground of appeal that is being relied upon. Second, to delete the requirements in IAC Rule 19(4) that a notice of appeal include information about the Appellant's need for an interpreter at a hearing and whether they intend to attend any hearing. These changes allow for the initial lodging of the appeal to be in the simplified form. Information about interpreters and attendance at hearings will still be gathered, but by a Tribunal Caseworker at a later stage.

43. In addition, the TPC is considering adding a Rule 19(8), indicating that a practice direction may specify categories of case in which the notice of appeal must also set out the grounds of appeal.

This reflects the fact that some categories of case will remain under the current system for some time. At present these are set out in the Presidential Practice Statement No 2 of 2020.

44. It is expected that, in the long term, these cases will be brought within the CCD approach. This is likely, however, to occur gradually and sometime after any revised rules come into force. Rule 19(8) would allow categories of case to be identified by practice direction in which it would be required to set out full grounds of appeal. This would preserve the previous approach to notices of appeal in these categories of case.

45. This would place responsibility for extending the operation of the new system with the Senior President of Tribunals, with the agreement of the Lord Chancellor. The TPC believes this would allow the extension to proceed incrementally and flexibly, while retaining appropriate judicial oversight of its development.

46. The relevant parts of a revised Rule 19 would therefore read (changes are in bold):

Notice of Appeal

19.—

(1) An appellant must start proceedings by providing a notice of appeal to the Tribunal.

(2) If the person is in the United Kingdom, the notice of appeal must be received not later than 14 days after they are sent the notice of the decision against which the appeal is brought.

(3) If the person is outside the United Kingdom, the notice of appeal must be received —

(a) *not later than 28 days after their departure from the United Kingdom if the person—*

(i) *was in the United Kingdom when the decision against which they are appealing was made, and*

(ii) *may not appeal while they are in the United Kingdom by reason of a provision of the 2002 Act; or*

(b) *in any other case, not later than 28 days after they receive the notice of the decision.*

(3A) But paragraphs (2) and (3) do not apply in relation to the bringing of an appeal against a citizens' rights immigration decision.

"A citizens' rights immigration decision" is a decision which can be appealed against under the 2020 Regulations.

(3B) The notice of appeal in relation to an appeal against a citizens' rights immigration decision must be received—

(a) if the person is in the United Kingdom, not later than 14 days after the appellant is sent the notice of the decision;

(b) if the person is outside the United Kingdom, not later than 28 days after the appellant receives the notice of the decision.

But this paragraph is subject to paragraph (3D).

(3C) Paragraph (3D) applies where—

(a) a person ("P") applies for an administrative review of a citizens' rights immigration decision ("the original decision") under the relevant rules, and

(b) P had not, before P receives notice of the decision on administrative review, started proceedings in relation to the original decision.

(3D) Where this paragraph applies, the notice of appeal against the original decision must be received—

(a) if P is in the United Kingdom, not later than 14 days after P is sent the notice of the decision on administrative review;

(b) if P is outside the United Kingdom, not later than 28 days after P receives the notice of the decision on administrative review.

(3E) In this rule, "the relevant rules" means residence scheme immigration rules or relevant entry clearance immigration rules (within the meanings given in section 17 of the European Union (Withdrawal Agreement) Act 2020).

(4) The notice of appeal must—

(a) identify which of the available statutory grounds of appeal are relied upon;

(b) be signed and dated by the appellant or their representative;

(c) if the notice of appeal is signed by the appellant's representative, the representative must certify in the notice of appeal that it has been completed in accordance with the appellant's instructions;

~~*(d) state whether the appellant requires an interpreter at any hearing and if so for which language and dialect;*~~

~~*(e) state whether the appellant intends to attend at any hearing; and*~~

~~*(f) state whether the appellant will be represented at any hearing.*~~

(5) The appellant must provide with the notice of appeal—

(a) *the notice of decision against which the appellant is appealing or if it is not practicable to include the notice of decision, the reasons why it is not practicable;*

(b) *any statement of reasons for that decision;*

(c) *an application for the Lord Chancellor to issue a certificate of fee satisfaction;*

(6) The Tribunal must send a copy of the notice of appeal and the accompanying documents or information provided by the appellant to the respondent.

(7) An appellant may, with the permission of the Tribunal, vary the grounds on which they rely in the notice of appeal.

(8) A practice direction may require that, in a specified category of case, the notice of appeal must also set out the grounds of appeal.

Rule 23 & 24: Response and Appeal Skeleton Arguments

47. The TPC is considering amending Rule 23 by deleting Rule 23(2)(b). Rule 23(2)(b) currently requires the Respondent in entry clearance cases to set out whether they oppose the Appellant's case and, if so the grounds for opposition. This requirement will be moved to a new Rule 24A, so that it occurs later in the process, after the Appellant has provided an ASA (or, if they are a LiP, set out why they believe the Home Office decision was wrong).

48. In addition, the TPC is considering adding a requirement to both Rule 23 and 24 that the Respondent also provide any document that had been provided to them in support of the original application that the appeal relates to. This would help ensure that the Tribunal is provided with all relevant documents.

49. Rules 23 and 24 would therefore read as follows (with changes in bold):

Response: entry clearance cases

23—(1) This rule applies to an appeal against a refusal of entry clearance or a refusal of an EEA family permit (which has the meaning given in regulation 2(1) of the 2006 Regulations).

(2) When a respondent is provided with a copy of a notice of appeal from a refusal of entry clearance or a refusal of an EEA family permit, the respondent must provide the Tribunal with—

(a) the notice of the decision to which the notice of appeal relates and any other document the respondent provided to the appellant giving reasons for that decision;

(b) any statement of evidence or application form completed by the appellant;

(c) any record of an interview with the appellant in relation to the decision being appealed;

(d) any other unpublished document which is referred to in a document mentioned in subparagraph (a) or relied upon by the respondent;

(e) the notice of any other appealable decision made in relation to the appellant; and

(f) ***any documents provided to the respondent in support of the original application.***

(3) The respondent must send to the Tribunal and the other parties the documents listed in paragraph (2) within 28 days of the date on which the respondent received from the Tribunal a copy of the notice of appeal and any accompanying documents or information provided under rule 19(6).

Response: other cases

24—(1) Except in appeals to which rule 23 applies, when a respondent is provided with a copy of a notice of appeal, the respondent must provide the Tribunal with—

(a) the notice of the decision to which the notice of appeal relates and any other document the respondent provided to the appellant giving reasons for that decision;

(b) any statement of evidence or application form completed by the appellant;

(c) any record of an interview with the appellant in relation to the decision being appealed;

(d) any other unpublished document which is referred to in a document mentioned in subparagraph (a) or relied upon by the respondent;

(e) the notice of any other appealable decision made in relation to the appellant;

(f) ***any documents provided to the respondent in support of the original application.***

(2) The respondent must, if the respondent intends to change or add to the grounds or reasons relied upon in the notice or the other documents referred to in paragraph (1)(a), provide the Tribunal and the other parties with a statement of whether the respondent opposes the appellant's case and the grounds for such opposition.

(3) The documents listed in paragraph (1) and any statement required under paragraph (2) must be provided in writing within 28 days of the date on which the Tribunal sent to the respondent a

copy of the notice of appeal and any accompanying documents or information provided under rule 19(6).

50. The new Rule 24A then deals with the process described above, by including rules for represented Appellants to submit an Appeal Skeleton Argument and dealing with the respondent's written statement in reply to that skeleton.

51. The process for LiPs is not set out in detail in Rule 24A, since it involves the Tribunal applying its general case management powers contained in Rule 4. At present, the TPC does not believe that setting out the process in rules is likely to assist LiPs. For clarity, however, a specific provision allowing the Tribunal to order the respondent to provide a written statement in cases where the Appellant is not represented is included. The TPC welcomes views on whether this is the best approach or a more specifc rule would assist LiPs.

52. The proposed Rule 24A(5) contains a similar provision to that proposed in Rule 19(8) to allow a practice direction to maintain the current approach to certain categories of cases.

> *Further steps*
> *24A (1) If the appellant is represented, upon the respondent complying with rule 23(2) or rule 24(1), as the case may be, the appellant must provide the Tribunal with:*
> *(a) an appeal skeleton argument which complies with the President's Practice Direction on Appeal Skeleton Arguments;*
> *(b) copies of the evidence relied upon in the appeal skeleton argument, insofar as that evidence is not already contained in the documents provided by the respondent under rule 23(2) or rule 24(1).*
>
> *(2) The documents in paragraph (1) are to be provided to the Tribunal within 28 days after the respondent complies with rule 23(2) or rule 24(1), as the case may be, or within 42 days after the notice of appeal is provided to the Tribunal, whichever is the later.*
>
> *(3) The respondent must no later than 14 days after compliance with paragraph (1) provide to the Tribunal and the appellant a written statement of whether the respondent opposes all or part of the appellant's case and if so the grounds for such opposition.*
>
> *(4) If the appellant is not represented, the Tribunal may order that the respondent provide to the Tribunal and the appellant a written statement of whether the respondent opposes all or part of the appellant's case and if so the grounds for such opposition.*
>
> *(5) A practice direction may disapply the requirement in 24A(1) in a specified category of case.*

53. The indicative drafting above sets out a single timescale for providing the ASA: within 28 days from the Tribunal receiving the response or, in any event, within 42 days of the notice of appeal being provided to the Tribunal. The Respondent then has 14 days to respond to the skeleton.

54. These are the timescales that have operated in CCD under the current standard directions annexed to the Presidential Practice Statement No 2 of 2020. The TPC welcomes views on whether these are the appropriate timescales, both in general and whether any particular category of cases should operate under a different timetable (either shorter or longer).

Greater involvement of Caseworkers

55. As noted above, a key feature of the pilot is greater involvement of non-judicial Tribunal Caseworkers to actively case manage appeals prior to hearings. Under CCD, Tribunal Caseworkers have been involved in facilitating the process set out above of preparing an appeal for hearing. They check that the documents being produced meet the requirements of relevant guidance. In particular, Tribunal Caseworkers check that the parties have properly engaged with each other in relation to the schedules of issues and that clarity about the issues has been reached before a case is listed before a judge.

56. It is expected that Tribunal Caseworkers would continue to carry out a similar role if the changes to the rules discussed above are implemented. To a large extent, the operation of Tribunal Caseworkers and any expansion of their role is unlikely to require amendments to the IAC Rules. Delegation to staff is dealt with in Rule 3, which provides:

> ***3 Delegation to staff***
> *(1) Anything of a formal or administrative nature which is required or permitted to be done by the Tribunal under these Rules may be done by a member of the Tribunal's staff.*
>
> *(2) Staff appointed under section 40(1) of the 2007 Act (tribunal staff and services) or section 2(1) of the Courts Act 2003 (court officers, staff and services) may, if authorised by the Senior President of Tribunals under paragraph 3(3) of Schedule 5 to the 2007 Act, carry out functions of a judicial nature permitted or required to be done by the Tribunal.*
>
> *(3) …*
>
> *(4) Within 14 days after the date on which the Tribunal sends notice of a decision made by a member of staff under paragraph (2) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge.*

57. The TPC does not currently intend to make any changes to this Rule. Delegation to staff will remain primarily a matter for the Senior President of Tribunals who is responsible for allowing staff to carry out functions of a judicial nature by granting authorisation. The TPC anticipates that this power will be exercised to permit Tribunal Caseworkers to exercise case management powers in accordance with Rule 4.

58. Any decision made by a Tribunal Caseworker is (and is intended to remain) subject to a right to apply to have the matter considered afresh by a Judge in accordance with Rule 3.

Appointments

59. To facilitate the work of Tribunal Caseworkers the TPC is considering introducing into the Rules the concept of an 'appointment'. An appointment, which could be conducted in person, by telephone or any other suitable method, would be called by a Tribunal Caseworker in order to allow parties to make representations before the Tribunal Caseworker exercised their case management powers.

60. The conduct of an appointment would, in many ways, be similar to a case management hearing. Parties would attend and have the opportunity to make submissions. The Tribunal Caseworker

would have the opportunity to ask questions. Where difficulties had arisen from misunderstanding, the appointment would allow both parties and Tribunal Caseworker to clarify the position. An appointment might be useful, for example, where the parties were struggling to articulate the issues in dispute or one party was seeking to raise issues that the other believed were irrelevant.

61. The TPC does not expect appointments to be necessary in most cases or to be common. Generally, Tribunal Caseworkers will exercise their powers based on consideration of the documents provided by the parties. Where a case is more complex or the case management issues are intensely disputed, it may not be suitable for it to be dealt with by a Tribunal Caseworker, instead requiring judicial involvement. In that case, a case management hearing conducted by a Judge, rather than an appointment conducted by a Tribunal Caseworker would be held.

62. In some cases appointments would not resolve matters and the Tribunal Caseworker could then refer the matter to a Judge for further consideration. This might result in a case management hearing. If a party disagreed with the decision made by the Tribunal Caseworker at an appointment, they could apply to have the matter considered afresh by a judge under Rule 3. This reconsideration would generally occur on paper, but might require a case management hearing in more complex or difficult cases.

63. Nonetheless, the TPC considers that appointments will be a useful case management tool in some cases.

64. The TPC believes that the concept and terminology of an appointment, as distinct from a case management hearing, is useful in maintaining a clear distinction between Tribunal Caseworkers and Judges and between their different roles in dealing with appeals.

65. The TPC is therefore considering inserting into Rule 1 a definition of appointment as follows:

"appointment" means a case management meeting, conducted by a member of the Tribunal's staff authorised to carry out functions of a judicial nature pursuant to rule 3(2), held for the purposes of carrying out any of those functions.

66. The TPC is also considering amending Rule 4(3) to include appropriate references to appointments, alongside the existing references to hearings. Rule 4(3) would therefore read (with changes in bold):

> *In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—*
> *…*
> *(f) hold a hearing* ***or an appointment*** *to consider any matter, including a case management issue;*
> *(g) decide the form of any hearing* ***or appointment****;*
> *(h) adjourn or postpone a hearing* ***or appointment****;*
> *(i) require a party to produce a bundle for a hearing* ***or appointment****;*

Sending documents via the online portal

67. In order to make clear provision for the use of the online portal, the TPC is considering an amendment to Rule 12. This would add 'Uploaded to the Tribunal's secure portal in a compatible file format' to the list of delivery methods in Rule 12(1). The TPC is also considering removing the reference to sending documents by fax, since this is expected to be much less common in the future (although it will remain an option where a fax number is provided by the Tribunal or a party, since it will remain within the scope 'any other method identified … by the Tribunal or person to whom the document is directed').

68. Rule 12(1) would therefore read as follows (with changes in bold):

> ***Sending, delivery and language of documents***
> ***12***. *—(1) Any document to be provided to the Tribunal or any person under these Rules, a practice direction or a direction must be—*
>
> *(a) delivered, or sent by post, to an address;*
> *(b) sent via a document exchange to a document exchange number or address;*
> *(c) sent by e-mail to an e-mail address;*
> *(d)* ***uploaded to the Tribunal's secure portal in a compatible file format****; or*
> *(e) sent or delivered by any other method, identified for that purpose by the Tribunal or person to whom the document is directed.*

Other changes

69. The TPC is also taking this opportunity to consult on possible changes to the IAC Rules and the Upper Tribunal Rules unrelated to the reform programme. A number of these seek to clarify the operation of the respective Rules following appellate decisions on their application.

First Tier Tribunal (IAC) Rules

Time limits and deemed sending

70. At present, where an appellant is in the UK, the deadline to provide a notice of appeal is calculated by reference to when the decision being appealed is sent. This is a common approach in procedure rules across Chambers. The approach is taken because, in general, it is expected to be easier to determine when decisions are sent than when they are received. This allows deadlines to be calculated more easily and with greater certainty.

71. The TPC is aware of concerns among the IAC Judiciary and more generally that this has not proved to be the case within the immigration field. Although Home Office decision letters are dated there is often a delay between the production of the letter and it being sent. The TPC understands that, at present, there is no reliable mechanism by which the date of a decision letter being sent can be definitely determined (this is expected to be addressed by future digitalisation projects within the Home Office).

72. This creates an unsatisfactory situation in which the deadline for the appeal is uncertain and must be estimated by the date given on the decision letter, the likely delay in sending that letter

out, any post mark on the letter (which may not be available if the recipient was unaware of its potential significance) and the date it was received. Much of this might be subject to factual dispute between the parties, although this itself will not necessarily be apparent prior to an appeal being lodged. This leaves the deadline for appeal uncertain and unclear.

73. The TPC is therefore considering introducing a concept of deemed sending into the rules, in which there would be a rebuttable presumption that a decision was sent out a set number of working days after the date that appears on the notice of decision. This would allow a clear deadline to be calculated based on the notice of decision.

74. Where a potential appellant is outside the UK, the deadline to provide a notice of appeal is calculated by reference to when the decision is received, rather than when it is sent. Similar difficulties in calculating the deadline can also arise in these cases. The TPC is therefore considering a similar rule in relation to deemed receipt.

75. The TPC is therefore considering a new Rule 19A:

> ***Deemed sending and receipt of the notice of the decision***
> ***19A (1) Unless the contrary is proved the notice of the decision against which an appeal is brought will be deemed to have been sent 2 working days after the date which appears on the notice of decision.***
> ***(2) Unless the contrary is proved the notice of the decision against which an appeal is brought will be deemed to have been received 10 working days after the date which appears on the notice of decision.***

76. Although such a rule would provide clarity it would also involve setting the deadline for an appeal by reference to a date that will, in some cases, not reflect the date on which the document was sent. This would potentially curtail the time an individual had to appeal. This difficulty could be addressed by adding additional days into the deeming provision, providing a buffer of time for the decision to be sent. This, however, would then extend the effective deadline for appeal in those cases where decisions were sent out promptly. It would also mean that different appellants would, in practice, have different lengths of time to appeal, depending on how quickly their decisions were sent. Finally, there may be difficulties, in principle, with allowing a potential party to future litigation to determine the deadline for an appeal though the date written in the notice of decision, rather than through the act of sending that decision to the affected individual.

77. The TPC has not yet reached any conclusion on these arguments, but wishes to consult in order to gather further evidence and stakeholder views before making any decision.

78. Any introduction of a deemed sending rule would not change or limit the Tribunal's existing powers to extend time or to permit a late appeal.

79. In addition to views on this approach in principle, the TPC is interested in any evidence or insight into the appropriate time frames if such a rule was to be introduced.

Substitution of parties

80. The TPC is considering whether to amend Rule 8 to remove references to a 'respondent', replacing them with reference to a 'party'.

81. This would make clear that the Tribunal is able to amend the name of an Appellant, once proceedings are underway. This is not intended to make a substantive change to the Tribunal's powers, since such amendments will have been made under the Tribunal's general case management powers. It does, however, make clear the Tribunal's ability to deal with that situation.

82. Rule 8 would then read as follows (with changes in bold):

> ***Substitution and addition of parties***
> *8. —(1) The Tribunal may give a direction substituting a* ***party*** *if—*
> *(a) the wrong person has been named as a* ***party****; or*
> *(b) the substitution has become necessary because of a change in circumstances since the start of proceedings.*
>
> *(2) The Tribunal may give a direction adding a person to the proceedings as a* ***party****.*
>
> *(3) The UNHCR may give notice to the Tribunal that they wish to participate in any proceedings where the appellant has made an asylum claim and on giving such notice becomes a party to the proceedings.*
>
> *(4) If—*
> *(a) the Tribunal gives a direction under paragraph (1) or (2); or*
> *(b) the UNHCR gives notice to the Tribunal under paragraph (3),*
> *the Tribunal may give such consequential directions as it considers appropriate.*

Contact details

83. The TPC is aware that there are sometimes problems with the Tribunal maintaining contact with Appellants, especially when an Appellant is removed or deported from the UK while proceedings are ongoing. The TPC is therefore considering adding a new Rule 12A to impose new requirements on parties in two respects.

84. The first is to add a requirement that, regardless of whether or not they are represented, the Appellant must provide information about where they are living, together with an email address (if they have one). In addition, Appellants will be required to inform the Tribunal of any changes to these details.

85. The second is to add a duty on the Home Office, in the event that an Appellant is to be removed or deported from the UK during proceedings, to notify the Tribunal; to seek to obtain contact details for the Appellant in the country to which they will be removed or deported; and to provide those details to both the Tribunal and the Appellant's representative.

86. Rule 12A would read as follows:

> ***Providing contact details***
> ***12A***

(1) An appellant must provide the Tribunal with the postal address at which they are living together with their email address, if they have one, and the Tribunal must be notified of any change to these details as soon as reasonably practicable.

(2) If the appellant has a representative it shall be the duty of that representative to take all reasonable steps to ensure that the appellant complies with paragraph 12A(1).

(3) If the respondent decides to remove or deport an appellant from the United Kingdom whilst proceedings before the Tribunal, including any application for permission to appeal, are pending the respondent must inform the Tribunal of that fact and take all reasonably practicable steps before any removal or deportation (as the case may be):

(a) to obtain from the appellant an email address, if they have one, and a postal address in the country to which it is intended to remove or deport the appellant to which correspondence may be sent to the appellant; and

(b) to provide that information to the Tribunal and to the appellant's representative, if they have one, as soon as reasonably practicable and in any event before removal or deportation (as the case may be).

87. Although no rule change will prevent all problems, the TPC believes that these provisions may reduce the number of occasions on which the Tribunal is simply unable to contact an Appellant.

Repeat bail applications and material change of circumstances

88. At present Rule 38(h) of the IAC Rules requires any bail application, where a previous application has been refused, to contain details of any material change in circumstances since the refusal.

89. This is most pertinent where Rule 39 might apply, since Rule 39 requires the Tribunal to dismiss without a hearing any application for bail made within 28 days of a Tribunal decision not to release on bail – unless there has been a material change in circumstances. In such cases it is vital that the application contain details of the change of circumstances relied upon.

90. The current rule, however, requires details of any material change in circumstances, regardless of the time frames involved. The TPC is considering altering this rule so that details are only required where a previous refusal took place less than 28 days before the application and thereby restricting it to cases where Rule 39 applies. Rule 38(3)(h) would then read (with changes in bold):

Subject to paragraphs (4) and (4A), a bail application must contain the following details—

…

(h) the grounds on which the application is made and, where a previous application has been refused, when it was refused and ***where the previous refusal took place less than 28 days before the application*** *details of any material change in circumstances since the refusal; and"*

91. This would make the rule less onerous for parties where significant time had elapsed between applications and the question of any material change in circumstances was no longer relevant to

the current application of bail. It would remain open to any party applying to bail to explain any change of circumstances that they wished to rely on in support for their application.

Out of Time Applications for Permission to Appeal to the Upper Tribunal

92. Rule 21(7) of the Upper Tribunal Rules is intended to deal with the situation where a party has applied to the First-tier Tribunal for permission to appeal, but has done so out of time, and the First-tier Tribunal has 'refused to admit' the application for permission because it was not made in time and no extension of time has been given. If permission to appeal is then sought from the Upper Tribunal, any application for permission must explain why the application for permission to the First-tier Tribunal was late and the Upper Tribunal must only 'admit the application' if it considers it is in the interest of justice to do so.

93. UT Rule 21(7), therefore, assumes that any late application for permission to appeal to the First-tier Tribunal will be dealt with by deciding whether to 'admit the application' to begin with, rather than admitting the application, but then refusing permission on the grounds that the application is made late.

94. The IAC Rules do not deal, expressly, with 'refusing to admit' an application for permission to appeal because it is late. Express provision for refusing to admit an application for permission is made in IAC Rule 33(7) in relation to potential appeals where it is the application for a written statement of reasons that is made out of time. But the IAC Rules are silent on how a Tribunal should proceed when the application for permission to appeal itself is late.

95. The situation arose in the case of *Bhavsar v Secretary of State for the Home Department* [2019] UKUT 00196. The President of the Upper Tribunal (IAC) concluded that where permission to appeal had been refused (rather than a late application not having been admitted), Upper Tribunal Rule 21(7) was not engaged, and the Upper Tribunal had no jurisdiction to refuse to admit an application to the Upper Tribunal for permission to appeal, which was itself in time, because the earlier application for permission from the First-tier Tribunal was late.

96. The President went on to conclude that, not withstanding the lack of an express rule, there was nothing in the IAC Rules that prevented the First-tier Tribunal from refusing to admit a late application for permission to appeal. Indeed, such a power was implicit in the IAC Rules read as a whole. Furthermore, the appropriate course was to refuse to admit the application because it was late, rather than to refuse permission to appeal. This was because, in doing so, Rule 21(7) of the Upper Tribunal Rules would be engaged, and the Upper Tribunal would be entitled to refuse any further application for permission to appeal, on the basis that the original application had been made out of time. This would avoid 'the extreme undesirability of allowing delay in applying for permission to the court or Tribunal below to be "wiped from the slate as long as the application to [the appellate body] is in time"' – even if that lateness might be a matter of months or years with no reasonable explanation for the delay.

97. To ensure that the Tribunal's procedures can readily be understood by parties reading them, the TPC is considering making an amendment to IAC Rule 33 to make explicit the currently implicit power to refuse to admit a late application for permission to appeal. Such an amendment would not be intended to produce a change in the current practice – which, following *Bhavsar*, is to refuse to admit such late applications using the implicit power. But it would confirm that

position and the TPC hopes having the process clearly stated in the IAC Rules would be beneficial to users. Rule 33(7) would then read:

> *(7) If an application for a written statement of reasons has been, or is, refused because the application was received out of time**, or the application for permission was received out of time,** the Tribunal must only admit the application for permission if the Tribunal considers that it is in the interests of justice to do so.*

Upper Tribunal Rules

Postal Rule

98. The TPC is similarly considering a rules amendment to the Upper Tribunal Rules arising from the case of *Sutharsan v Secretary of State for the Home Department* [2019] UKUT 00217. There the Upper Tribunal established that the deadline for acknowledging service in immigration judicial review proceedings begins on the day after the party concerned is provided with a copy of the application for permission to judicially review, rather than on the day that it was sent. Further, the President of the Upper Tribunal decided that, in accordance with the overriding objective, the Upper Tribunal should deem that a document posted by first class post was provided on the second working day after it was posted, unless the contrary is proved – effectively applying the postal rule found in CPR 6.14. By doing so, the Upper Tribunal would ensure that judicial review cases were dealt with in the same way in the Tribunal system as they were in the High Court.

99. The TPC is considering making that deeming provision explicit in the Upper Tribunal Rules, so that the position is clear on the face of the Rules, rather than requiring knowledge of the decision in *Sutharsan*. This would be done by adding a Rule 13(8) to the Upper Tribunal Rules as follows:

> *(8) In judicial review proceedings, unless the contrary is proved, a document sent by first class post will be deemed to be provided or received on the second working day after it was posted.*

Questions

Question 1: Do you agree with the proposed changes to Rules 19, 23 and 24 relating to the process of lodging an appeal / response and the introduction of the skeleton argument stage prior to a hearing? If not, why not?

Question 2: Do you agree with the introduction of a 'appointment to facilitate the use of Caseworkers' delegated powers? If not, why not?

Question 3: Do you agree with the introduction of 'deemed sending' and the proposed Rule 19A? If not, why not? If such a rule is introduced, what time periods should be applied and why?

Question 4: Do you agree with the suggested changed to Rule 8 in relation to the substitution of parties? If not, why not?

Question 5: Do you agree with the proposed duties in relation to contact details under the proposed Rule 12A? If not, why not?

Question 6: Do you agree with the proposed amendment to rule 38 in relation to repeat bail applications? If not, why not?

Question 7: Do you agree with the proposed amendment to Rule 33 to make explicit the First-tier Tribunal's power to refuse to admit a late application for permission to appeal? If not, why not?

Question 8: Do you agree with the proposed amendment to Upper Tribunal Rule 13 to make explicit the application of the postal rule in immigration judicial review proceedings?

Question 9: Do you have any other comments?

How to Respond

Please reply using the response questionnaire template.

Please send your response by **14 July 2021** to:
The Secretary, Tribunal Procedure Committee
Post point 10.18, 102 Petty France
London SW1H 9AJ

Email: tpcsecretariat@justice.gsi.gov.uk

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