Tribunal Procedure Committee

Consultation on possible changes to rule 24 of the Upper Tribunal Rules 2008

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Tribunal Procedure Committee Overview

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: https://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: https://www.gov.uk/government/organisations/tribunal-procedure-committee

6. The First-tier Tribunal ("F-tT") is divided into separate chambers which group together jurisdictions dealing with like subjects or requiring similar skills. The F-tT Chambers are:

- Social Entitlement Chamber ("F-t T(SEC)")
- Health, Education and Social Care Chamber ("F-tT(HESCC)")
- War Pensions and Armed Forces Compensation Chamber ("F-tT(WPAFCC)")
- General Regulatory Chamber ("F-tT(GRC)")
- Immigration and Asylum Chamber ("F-tT(IAC)")
- Tax Chamber ("F-tT(Tax)"); and
- Property Chamber ("F-tT(PC)").

7. Likewise, the Upper Tribunal ("UT") is divided into separate Chambers. The UT mainly, but not exclusively, decides appeals from the F-tT.

8. Appeals from F-tT Chambers other than the F-tT(PC) are dealt with by either the Upper Tribunal (Administrative Appeals Chamber), the Upper Tribunal (Immigration and Asylum Chamber), or the Upper Tribunal (Tax and Chancery Chamber). The work of these Chambers is described below.

9. The Rules which apply across these Chambers are the Upper Tribunal Rules 2008 (the "UT Rules"). These Rules can be found in the "Publications" section of our website: https://www.gov.uk/government/organisations/tribunal-procedure-committee

10. Appeals from the F-tT(PC) are dealt with by the Upper Tribunal (Lands Chamber). That Chamber also has other jurisdictions, but all matters are dealt

with under the Upper Tribunal (Lands Chamber) Rules. This Consultation is not concerned with the Upper Tribunal (Lands Chamber) Rules, but only with the Upper Tribunal Rules.

Consultation Introduction – UT rule 24

11. The purpose of this Consultation is to seek views as to possible changes to UT rule 24. That rule concerns the provision, by a respondent, of a 'response' to a notice of appeal. UT rule 24 has been in place for some time, and the TPC is not aware that its operation – over thousands of appeals - has caused any material difficulties, save as regards issues canvassed in the cases referenced in this Consultation.

12. In material part the terms of UT rule 24 are as follows (with emphasis added, as relevant to this Consultation).

*24.— **Response to the notice of appeal***
(1) ….
(1A) Subject to any direction given by the Upper Tribunal, a respondent may provide a response to a notice of appeal.
(2) Any response provided under paragraph (1A) must be in writing and must be sent or delivered to the Upper Tribunal so that it is received—
(a) if an application for permission to appeal stands as the notice of appeal, no later than one month after the date on which the respondent was sent notice that permission to appeal had been granted;
(ab) in a quality contracts scheme case, no later than 1 month after the date on which a copy of the notice of appeal is sent to the respondent; or
(b) in any other case, no later than 1 month after the date on which the Upper Tribunal sent a copy of the notice of appeal to the respondent.
(3) The response must state—
(a) the name and address of the respondent;
(b) the name and address of the representative (if any) of the respondent;
(c) an address where documents for the respondent may be sent or delivered;
(d) whether the respondent opposes the appeal;
(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal; and
(f) whether the respondent wants the case to be dealt with at a hearing.
(4) If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule

5(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time.

The appeals procedure

13. UT rule 24 may be placed in context. Rights to appeal from the F-tT to the UT, and only with permission to appeal ("PTA"), are provided for by section 11 of the TCEA (set out below, insofar as material):

11 Right to appeal to Upper Tribunal
(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
(2) Any party to a case has a right of appeal, subject to subsection (8).
(3) That right may be exercised only with permission (or, in Northern Ireland, leave).
(4) Permission (or leave) may be given by—
(a) the First-tier Tribunal, or
(b) the Upper Tribunal,
on an application by the party.

14. A party who is dissatisfied with a decision of another tribunal (such as the F-tT) may gain PTA, and if so that party (the appellant) will file a notice of appeal (under UT rule 23), which will be provided by the UT to the respondent to the appeal. The opportunity to provide a UT rule 24 response to a notice of appeal then follows. UT rule 25 deals with any reply to a respondent's UT rule 24 response. This suite of rules is set out in full in **Annex A**. Under the UT Rules, following provision of the above documents (or expiry of time limits to provide them), directions may be given by the UT.

The *Devani* and *SSE* cases

15. This Consultation has been prompted by 2 recent cases in the Court of Appeal. These cases are:

- *Devani v SSHD* [2020] EWCA Civ 612 (on appeal from the UT(IAC), in which the Court held that on a 'purposive interpretation' of UT rule 24, if a respondent wished to rely on grounds on which it had been unsuccessful

in the F-tT (as did the respondent in that case), then it was under an obligation to provide a UT rule 24 response.

- *HMRC v SSE Generation Limited* [2021] EWCA Civ 105 (on appeal from the UT(TCC), in which the Court held that where a respondent had lost on an issue in the F-tT, the respondent had been obliged to seek PTA (from the F-tT) in respect of that issue, and within the time permitted for so doing. Without such PTA (which had not been sought), the respondent should not have been permitted (by the UT) to advance its arguments in the UT simply via the route of a UT rule 24 response.

16. Both cases are reviewed in detail below. At this stage, however, it is convenient to set out some preliminary observations on these cases.

Preliminary observations on the *Devani* case

17. In the *Devani* case, it was further held that:
    - There had been no breach of UT rule 24 as interpreted by the Court (see above), since the time limit for a response had not expired as at the date of the appeal hearing.
    - Nonetheless, the UT and the appellant should have been put on notice of grounds of challenge to the F-tT decision before the hearing, by a UT rule 24 response before the hearing, in correspondence or in a skeleton argument.
    - The failure to give proper notice of those grounds did not mean that the challenge could not be entertained. The UT could and should have exercised its discretion to entertain the challenge.
    - The Court could re-make the decision of the UT as to entertaining the challenge, and it did so. The grounds on which the respondent had been unsuccessful in the F-tT were upheld by the Court.

18. As such, the result in *Devani* was concerned with error of law in the exercise by the UT of a discretion afforded under the UT Rules. As to exercise of discretion, the overriding objective is always to be borne well in mind by the UT. UT rule 2 states as follows:

Overriding objective and parties' obligation to co-operate with the Upper Tribunal

2.— *(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.*

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Upper Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Upper Tribunal must seek to give effect to the overriding objective when it

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Upper Tribunal to further the overriding objective; and

(b) co-operate with the Upper Tribunal generally.

19. The TPC considers that the operation of tribunal rules is always to be judged in the context of cases to which they apply, and have been applied. It might be thought that an underlying difficulty giving rise to the issues dealt with by the Court in the *Devani* case was because the respondent simply had insufficient time (for whatever reason) to prepare for the appeal hearing, which took place before the time for a UT rule 24 response had expired. A practical approach would be, of course, for the UT not to list the appeal for hearing before (at least) the time for a UT rule 24 response has passed.

20. The Court of Appeal of course does not make Tribunal rules. That is the responsibility of the TPC, which is under an obligation to consult, as appropriate.

Preliminary observations on the *SSE* case

21. Sections 11(3) and (4) of the TCEA (see paragraph 13 above) provide that PTA may be given by <u>either</u> the F-tT or the UT. There is no statutory requirement that the F-tT must refuse PTA before an application is made to the UT, unlike an appeal to the Court of Appeal (section 13(5) of the TCEA – "*An application may be made under subsection (4) to the relevant appellate court only if permission*

(or leave) has been refused by the Upper Tribunal."). It should follow that in the UT, the need for a 'first' application to the F-tT for PTA is not a jurisdictional requirement, as such a requirement can only be imposed by statute.

22. However, the need for a 'first' application for PTA to be made to the F-tT is dealt with in UT rule 21(2), which provides as follows (insofar as material, with emphasis added):

Application to the Upper Tribunal for permission to appeal
21.— *(1) This rule applies to an application for permission to appeal to the Upper Tribunal against any decision.*
(2) A person may apply to the Upper Tribunal for permission to appeal to the Upper Tribunal against a decision of another tribunal only if—
(a) they have made an application for permission to appeal to the tribunal which made the decision challenged; and
(b) that application has been refused or has not been admitted.
(3) An application for permission to appeal must be made in writing and received by the Upper Tribunal no later than—
(a) in the case of an application under section 4 of the Safeguarding Vulnerable Groups Act 2006, 3 months after the date on which written notice of the decision being challenged was sent to the appellant; or
(b) otherwise, a month after the date on which the tribunal that made the decision under challenge sent notice of its refusal of permission to appeal, or refusal to admit the application for permission to appeal, to the appellant.

23. If this rule cannot set out a jurisdictional requirement (see above), it is a procedural requirement only. It is considered that the Court in the *SSE* case appears to have overlooked this distinction. If the requirement to apply first to the F-tT for PTA is procedural only, a failure to comply is an irregularity that can be waived by the UT (UT rule 7(1) and (2)), if to do so is consistent with the overriding objective UT rule 2(2) – see paragraph 18 above. UT rule 7 (insofar as material) provides as follows.

Failure to comply with rules etc.
7.— *(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.*
(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Upper Tribunal may take such action as it considers just, which may include—
(a) waiving the requirement;
(b) requiring the failure to be remedied;

(c) exercising its power under rule 8 (striking out a party's case); or
(d) except in mental health cases, restricting a party's participation in the proceedings.

The Court in the *SSE* case made no mention of UT rule 7; it appears that its attention was not drawn to that rule.

The 'business' of the Upper Tribunal

24. Both cases raise matters of importance as regards UT rule 24, hence this Consultation. As background, it is important to understand the 'business' of the UT to which UT rule 24 applies (as do all the UT Rules). That business in large part derives from the 'business' of the F-tT in dealing with appeals within its various Chambers. Appeals in the UT are not limited however to appeals in cases that have first been heard in the F-tT. They include 'references' of decisions made by various agencies or regulators, as will be seen below.

25. The types of appeals in each of the F-tT Chambers are set out in **Annex B**. These are important to bear in mind since it is 'onward' appeals in these cases which will fall to be dealt with by reference to the UT Rules, and UT rule 24 in particular. There are very many disparate F-tT jurisdictions. Many appellants in the F-tT will be litigants in person ("LIPs").

26. A respondent in the UT (and hence subject to UT rule 24) will usually have been, but not always, a party to proceedings in the F-tT. If the appellant in the F-tT succeeds in the case, and the case goes on appeal to the UT, then the appellant in the F-tT will become the respondent in the UT. It follows that at least some respondents in the UT will be LIPs.

27. The different UT Chambers, and the work they do, are now set out.

The Upper Tribunal (Administrative Appeals Chamber)

28. The Upper Tribunal (Administrative Appeals Chamber), (the "UT(AAC)"), is responsible for dealing with appeals against decisions made by certain Chambers of the F-tT, and certain decisions made by others. These include:

- social security and child support (appeals from F-tT(SEC))
- war pensions and armed forces compensation (appeals from F-tT(WPAFCC))
- mental health (appeals from F-tT(HESCC))
- special education needs or disabilities (appeals from F-tT(HESCC))
- disputes heard by the F-tT(GRC) (appeals from that tribunal, other than in charities cases)
- decisions made by the Disclosure and Barring Service
- decisions made by the Traffic Commissioner (or the Transport Regulation Unit in Northern Ireland)
- Special Education Needs Tribunal for Wales (appeals from that Tribunal)
- Mental Health Review Tribunal for Wales (appeals from that Tribunal)
- Pensions Appeal Tribunal in Northern Ireland (only for assessment appeals under the War Pensions Scheme) (appeals from that Tribunal)

The Upper Tribunal (Immigration and Asylum Chamber)

29. The Upper Tribunal (Immigration and Asylum Chamber), (the "UT(IAC)"), is responsible for handling appeals against decisions made by the F-tT(IAC), relating to visa applications, asylum applications and the right to enter or stay in the UK. All these appeals are from the F-tT(IAC). The *Devani* case was on appeal from the UT(IAC).

The Upper Tribunal (Tax and Chancery Chamber)

30. The Upper Tribunal (Tax and Chancery Chamber), (the "UT(TCC)"), is responsible for handling appeals against, and references of, certain decisions made by:
    - F-tT(Tax), for cases about tax (appeals from that tribunal)
    - F-tT(GRC), for cases about charities (appeals from that tribunal)
    - Financial Conduct Authority

- Prudential Regulation Authority
- Secretary of State for International Trade or the Trade Remedies Authority
- Pensions Regulator
- Bank of England
- HM Treasury
- Ofgem

Civil Procedure Rules

31. The Civil Procedure Rules (the "CPR") are not the rules which govern practice and procedure in the tribunal system. Parties (or their representatives) will sometimes refer to provisions of the CPR in support of their arguments, as they have done in cases referred to in this Consultation. The TPC considers that comparisons with the CPR may sometimes be useful, but they are not of course to be regarded as in any way determinative. It is convenient at this stage to set out the terms of CPR 52.13, in comparison to those of UT rule 24.
32. Provision of a 'respondent's notice' under the CPR is mandatory in the circumstances specified below (emphasis added).

Respondent's notice
52.13
(1) A respondent may file and serve a respondent's notice.
(2) A respondent who—
(a) is seeking permission to appeal from the appeal court; or
(b) wishes to ask the appeal court to uphold the decision of the lower court for reasons different from or additional to those given by the lower court, must file a respondent's notice.
(3) Where the respondent seeks permission from the appeal court it must be requested in the respondent's notice.

33. It will be noted that CPR 52.13 also provides for PTA to be sought by a respondent within the terms of a respondent's notice.

History of UT rule 24

34. It may also be considered helpful to set out some history as regards UT rule 24 (indeed, as to the UT Rules), and the process of statutory consultation earlier undertaken by the TPC.

35. UT rule 24 was first created in the UT Rules made in late 2008. **Annex C** hereto sets out a full narrative of the drafting history.

36. Alongside its statutory objectives (see above), the TPC recognized (then, as now) that as a general rule, tribunals are intended to provide citizens with speedy and inexpensive access to justice. Tribunals are meant to be more user-friendly and less legalistic than the Courts. Tribunals, comprising as they often do not only judges but also lay members with relevant qualifications or experience, have a specialist expertise which is often absent in the case of court judges whose jurisdictions are very wide. It cannot be expected that court judges can have a technical expertise across all the types of case which they hear.

37. These points may be considered important. Tribunal rules (as made) may be considered appropriately succinct and providing flexibility to the tribunals, in particular to enable case management of proceedings in a way that minimizes expense and inconvenience and makes the most of tribunal judiciary specialist expertise and experience.

38. The CPR, in comparison, are considerably more detailed and prescriptive. In particular, the equivalent of CPR 52.13 was then (in 2008) CPR 52.5, in identical form to current CPR 52.13. Tracking that wording (in drafting UT rule 24) was not the course taken by the TPC.

39. The process of moving towards the present form of UT rule 24 was widely, and successively, consulted on (see Annex C).

40. The TPC's Reply (June 2009) in respect of 2 of the consultations stated the following:

"25. The Committee has adopted an open style in the Tribunal Procedure Rules to allow tribunals as much flexibility as possible. The consequence is that former rules that were more prescriptive have not been reproduced. Nonetheless, the tribunal will often be able to adopt the same procedures within the new rules and will be able to issue directions (including standard directions) for that purpose. Several issues raised in the responses were, in our view, matters of detail that could more appropriately be dealt with through such directions, or through Practice Directions issued by the Senior President of Tribunals or Chambers Presidents under section 23 of the Tribunals, Courts and Enforcement Act 2007, than through rules."

The *Devani* case

41. We now turn to the *Devani* case, in more detail (see paragraphs 42 to 59 below). We shall also review 2 cases decided by the Court of Appeal prior to the *Devani* case, which had raised issues as to UT rule 24 similar to those raised in that case (see paragraphs 60 to 86 below).

42. In *Devani v Republic of Kenya* [2015] EWHC 3535 (Admin), the Divisional Court had rejected challenges made by the appellant (in later tribunal proceedings – see below) to extradition requests by the Government of Kenya, including that his extradition would be contrary to his ECHR rights, in particular his Article 3 and 6 rights.

The F-tT proceedings

43. The appellant later appealed to the F-tT(IAC) against the refusal by the Secretary of State for the Home Department ("SSHD") of his asylum and human rights claim. In the F-tT, the appellant was represented by counsel; the SSHD was represented by a Home Office presenting officer. The role of a Home Office presenting officer is to represent the SSHD before the tribunal. This involves advocacy and also making decisions about case management based on fact, guidance and an interpretation of the law. The SSHD instructs counsel in the most complex cases.

F-tT findings, obvious error, and failure to correct it

44. The F-tT found ("the Article 3 reasons/findings") that there was evidence of a real risk that if the appellant was returned to Kenya, assurances given by the Kenyan

government would not be adhered to and that he would be held in conditions breaching Article 3 ECHR. Despite this, the F-tT in its decision notice had 'dismissed' the appeal on the Article 3 ground. This was an obvious error, but case law suggested that it could not be corrected through the slip rule (F-tT(IAC) Rules, rule 31). (Subsequent case law allows such a correction.)

45. Permission to appeal the decision was given to the appellant by the F-tT. It might be thought unfortunate that a review by the F-tT (by reference to F-tT(IAC) rules 34 and 35) was not undertaken, or if it was undertaken, it did not reach the correct conclusion. An application for permission to appeal had been made, and there was an evident error of law. The TPC considers that the difficulty arising from the evident error could and should have been simply resolved. Had that taken place, with the appeal succeeding on Article 3 grounds (as was the intention of the F-tT), then it would have been the SSHD who would have been the appellant in the UT. (That said, until Practice Statements of the F-tT(IAC) and UT(IAC) were issued in June 2018 it was not clear that the F-tT could set such a decision aside, and re-decide the matter. The reality is that a case such as the *Devani* case would no longer, on the relevant substantive issues, ever get to the UT.)

46. Nonetheless, the appellant duly filed his appeal in the UT, relying on the single point that the F-tT's decision notice did not correspond to its Article 3 reasons/findings.

The UT appeal hearing

47. The notice of appeal having been sent to the SSHD, the case was heard in the UT(IAC) before the 1 month time limit for provision of a UT rule 24 response had expired. The appellant was represented at the hearing by leading counsel (with junior counsel who had appeared in the F-tT); the SSHD was represented by a Home Office presenting officer different to the presenting officer who had represented in the F-tT.

48. The UT(IAC) held, unsurprisingly, that the F-tT had clearly intended to allow the appeal on Article 3 grounds, and that in recording the appeal to have been

dismissed it had made an error of law. The UT set aside the decision and allowed the appeal on Article 3 grounds in line with the F-tT's Article 3 reasons/findings.

49. However, in reaching its decision, the UT had declined to consider the SSHD's case challenging the Article 3 reasons/findings, in the following circumstances at the appeal hearing.

    - The appellant had prepared a skeleton argument developing the single point of appeal that the F-tT decision did not correspond to the Article 3 reasons/findings. There was no skeleton argument from the SSHD.
    - The appellant's leading counsel, in opening the appeal, notwithstanding the absence (at that point) of any challenge to the Article 3 reasons/findings, argued that it was not open to the presenting officer to challenge those findings, since the SSHD had neither appealed nor provided a UT rule 24 response. However, she went on to explain the background to those reasons/findings, and to commend to the UT their substance.
    - The presenting officer, in response, embarked directly on a challenge to the Article 3 reasons/findings. The UT raised with him the question whether the SSHD could have appealed or put in a UT rule 24 response. He submitted that as the (ostensible) winner, the SSHD could not appeal; it is not known what, if anything, he said about UT rule 24.
    - In her reply submissions, the appellant's counsel repeated more fully her objection to the SSHD seeking to challenge the Article 3 reasons/findings in the absence of a cross-appeal or UT rule 24 response. However, she did not suggest that she was unable to deal with the challenge; she proceeded to address it substantively. She submitted that the only question was whether the Article 3 reasons/findings were perverse, and that they plainly were not.

50. The UT nonetheless declined to consider the SSHD's challenge to the Article 3 reasons/findings, on the basis that the SSHD had failed to raise it in accordance with "*the relevant procedure rules*": specifically, the failure (a) to appeal or (b) to provide a UT rule 24 response or (c) to serve a skeleton argument.

In the Court of Appeal

51. The SSHD appealed to the Court of Appeal. The substantive issue was whether the UT had made an error of law in declining to consider the challenge to the Article 3 reasons/findings. It was in that context that the interpretation of UT rule 24 was considered, and the Court held that if a respondent wished to rely on grounds on which it had been unsuccessful in the F-tT (as did the SSHD), then it was under an obligation to provide a UT rule 24 response.

52. In relation to interpretation of UT rule 24, the Court also drew attention to some earlier comments (made in passing) by the UT(TCC) in *Acornwood v HMRC* [2016] UKUT 361 (TCC).

53. In the *Acornwood* case, the respondent (HMRC) had stated (but it is unclear when) that it did not intend to provide a UT rule 24 response, and it did not do so.

    - However, when it came to agreeing the bundles for the appeal hearing, a disagreement arose (again, it is unclear when) as to whether HMRC was entitled to rely upon documents which had not been relied upon by the F-tT.
    - In that connection, HMRC contended (again, it is unclear when) that there was no requirement for a respondent to file a UT rule 24 response in order to be able to rely on reasons not relied on by the F-tT, or indeed to rely upon grounds which were unsuccessful before the F-tT, since UT rule 24(1A) provides that the respondent may provide a UT rule 24 response.
    - HMRC's position was that although it was important that an appellant should know in advance what arguments a respondent intended to rely upon, that did not need to be done in a UT rule 24 response, and could be provided, for example, in a skeleton argument (as must have happened).

54. The UT stated that it was considered likely that the TPC had contemplated that any respondent who intended to oppose the appeal should put in a UT rule 24

response, specifying the grounds on which the respondent relied. It was also considered that if a respondent wished to rely on any grounds in support of their opposition to an appeal (other than simply relying on the decision which is being appealed) then they should say so by a response; and if they failed to say so, and failed to obtain an extension of time, then the consequence is that they cannot run such arguments on the appeal without the permission of the tribunal.

55. It is to be assumed that the arguments HMRC would have wished to run were all in its skeleton argument. There was no question of 'prejudice' arising on the disposition of the case. It is not known what were the additional points HMRC were seeking to run (since it was not necessary to deal with them in disposing of the case).

56. As to whether the TPC had contemplated (in making the UT Rules) that any respondent who intended to oppose the appeal should put in a UT rule 24 response, see Annex C for the drafting history.

A 'purposive interpretation' as in *Devani*

57. The Court of Appeal in *Devani* relied on a 'purposive interpretation'. The TPC considers that there are limits to the exercise of such an approach. The Supreme Court in *Shahid v Scottish Ministers* [2015] UKSC 58 stated that the only principle of statutory interpretation which might enable the plain meaning of legislation to be circumvented is that it can be given a strained interpretation where that is necessary to avoid absurd or perverse consequences. The adjectives *"absurd*" and "*perverse*" set the bar high.

58. Further, it may generally be recognised that "*a possible anomaly carries less weight if there is interposed the discretion of some responsible person by the sensible exercise of which the risk may be obviated*." (see Bennion, Bailey and Norbury on Statutory Interpretation 8th Edition. (Section 13.5, p.494).)

59. The TPC draws attention to these matters since the exercise of discretion by the UT, in appropriate circumstances, is an important aspect of application of the UT

Rules. That is the case regardless of the 'starting point' of rules intended to be simple, and simply expressed.

- Directions may be given, in exercise of a discretion to give them. There are wide case management powers under UT rule 5.
- Discretion may be exercised in the absence of compliance with a rule or a direction, depending on for example any prejudice to any party. That was the outcome in the *Devani* case (in the Court of Appeal) and would have been a relevant consideration in the *Acornwood* case, had the issue under UT rule 24 required resolution.
- Always, the UT must seek to give effect to the overriding objective, by UT rule 2 (see paragraph 18 above).

Court of Appeal cases prior to the *Devani* case

60. Non-provision of a UT rule 24 response had been considered in two earlier Court of Appeal cases (both on appeal from the UT(IAC)). In neither case had it been considered that a UT rule 24 response was obligatory in similar circumstances to those in the *Devani* case. Neither case was cited to the Court of Appeal in the *Devani* case. These cases are *NP (Sri Lanka) v SSHD* [2012] EWCA Civ 906, and *MWA (Afghanistan) v SSHD* [2014] EWCA Civ 706, and they are now considered.

NP (Sri Lanka) v SSHD

61. In *NP (Sri Lanka) v SSHD* [2012] EWCA Civ 906, the Court of Appeal had determined an appeal against a decision by the UT to remake an asylum decision of the F-tT (namely, refusing the appellant's appeal), and in so doing had considered non-provision of a UT rule 24 response by the SSHD.

The F-tT proceedings

62. The F-tT had held that the appellant's account of his detention and escape was not credible, and that it was not reasonably likely that he would be of any interest to the Sri Lankan authorities if he were returned there.

63. The F-tT had also found the appellant to be from his home area and that he had never been detained by the authorities. However, it did not then go on to find (as required by binding authority) that the appellant would be at real risk on return to his home area, as he had not been screened. (This was found by the UT to be an error of law).

64. However, the claim remained to be determined on the basis of the 'internal flight' alternative: whether the appellant could relocate to Colombo (as opposed to his home area) and whether it would not be unduly harsh for him to do so. The appellant himself had taken the view that his appeal to the F-tT turned on internal flight (his skeleton argument before the F-tT reflected this). The F-tT had materially erred however (as later found by the UT) in not addressing this issue of internal flight, simply accepting the SSHD's primary case at that time that the appellant was not in any event a refugee.

Appeal to the UT

65. The appellant appealed on the basis that the F-tT had materially erred in law in not applying binding authority and thus being obliged to find that the appellant would be at real risk on return to his home area, and hence that the claim would have to be determined on the basis of the internal flight alternative. As such, it was contended that the F-tT had materially erred in not addressing the issue of internal flight.

66. By the time of the UT appeal hearing, the SSHD had provided neither a UT rule 24 response nor a skeleton argument dealing with internal flight.

67. The UT accepted the case of the SSHD on internal flight: that the appellant could relocate to Colombo (as opposed to his home area) and that it would not be unduly harsh for him to do so. As such, 'internal flight' had been possible, and the appellant's appeal (to the F-tT) was dismissed by the UT by a re-made decision.

In the Court of Appeal

68. The appellant's principal ground of appeal in the Court of Appeal was that (1) 'internal flight' had not been part of the SSHD's case in its decision letter and before the F-tT; and (2) the SSHD had failed to file a UT rule 24 response as regards internal flight. In those circumstances, it was contended that the UT had lacked all jurisdiction to entertain the issue of internal flight.

69. Pausing there, it will be noted that the SSHD had not been 'unsuccessful' in the F-tT on the issue of internal flight – that issue had failed to be addressed at all by the F-tT. The (later) *Devani* interpretation of UT rule 24 would not have assisted the appellant, but internal flight was a ground on which the SSHD was to rely in the UT. If the (later) *Devani* interpretation had been considered correct, it is difficult to see why it would not also apply to '*the grounds on which the respondent relies*' (under UT rule 24(3)(e)) and require provision of a UT rule 24 response.

70. That approach (an obligation to provide a UT rule 24 response) was not taken by the Court of Appeal, however. It stated as follows.

    - Although the SSHD had provided neither a UT rule 24 response nor a skeleton argument, there was no breach of UT rule 24.
    - Even had there been a breach, that could not act as a jurisdictional bar to the UT's power and duty to consider an issue such as that relating to internal flight. Likewise, the failure to serve a skeleton argument could not have that effect. (It was likely that a skeleton argument was not served because the SSHD was conceding that the appellant would not be safe if returned to his home area.)
    - UT rule 24 was an important provision, as an important means of securing procedural fairness. If an appellant was so taken by surprise by an issue being raised such as that of internal flight that he could not properly deal with it, he would of course be accommodated as

appropriate by an adjournment in the tribunal, or if necessary by the tribunal's declining to entertain the point.

- If the UT dealt with such an argument without giving the appellant a proper opportunity, the Court of Appeal would likely be sympathetic to an appeal, though the appeal would be on fairness grounds and the relief granted would in all probability be a remittal for a rehearing of the case, not a grant of asylum outright with the new point left unconsidered.
- However, the appellant had been well able to deal with the factual merits of the internal flight issue when it came to the UT. His skeleton argument before the UT canvassed that issue and the UT's determination showed that it was amply and properly gone into on the appellant's behalf. There was nothing in the UT rule 24 point.
- Neither the F-tT or the UT had lacked jurisdiction to deal with the internal flight issue.
- The public interest was engaged in this case, as in all asylum cases. In such cases there are two aspects to the public interest: first there is a public interest in the fulfilment by the United Kingdom of its obligation under municipal and international law to afford protection to genuine refugees. Secondly there is also a public interest in the denial of such protection to those who are not substantially entitled to it. That interest will be affronted by the grant of asylum on technical grounds to a person who, upon an examination of the merits, had no proper claim to it.

71. The Court of Appeal saw no reason to conclude that provision of a UT rule 24 response was obligatory in the circumstances of the case. The crux was fairness between the parties. Furthermore, the duty of the UT was to ensure that public rights were granted to those who merit them, and not granted to those who do not.

72. It might be thought there was nothing in the facts of the *Devani* case to justify a difference in approach to that taken by the Court of Appeal in the *NP (Sri Lanka)* case.

MWA (Afghanistan) v SSHD

73. In *MWA (Afghanistan) v SSHD* [2014] EWCA Civ 706, the appellant had appealed to the Court of Appeal against a decision by the UT that the appellant was an adult (not a minor, as had been found by the F-tT) and that there would be no risk on return of breach of Article 8 ECHR or other objection to removal. The UT had remade the decision of the F-tT and dismissed the appellant's appeal.

The F-tT proceedings

74. The F-tT had first held (in deciding a preliminary issue) that the appellant was a minor. Following this, the SSHD had withdrawn its immigration decision and made a further decision, again refusing the asylum claim.

75. The appellant appealed to the F-tT in respect of this further decision. In its decision, the F-tT held that it could see no basis to interfere with the earlier F-tT finding as to age, but the appeal was nonetheless dismissed (the "second F-tT decision").

The Divisional Court

76. Meanwhile, judicial review proceedings had been brought by the appellant in respect of a decision by a City Council to refuse support under the Children Act 1989 (such refusal being on the ground that he was not a minor). These proceedings were decided by Beatson J, who concluded that the appellant was an adult. Application for permission to appeal that decision was refused by the Court of Appeal.

Appeal to the UT

77. In the meantime, the appellant had gained permission to appeal the second F-tT decision to the UT, on the grounds that the F-tT had failed to take into account his age when dismissing the substantive asylum claim. By this time, the SSHD's position was that, following the decision of Beatson J, she was entitled to

maintain that the appellant was indeed an adult at all relevant times, and the appellant's solicitors were informed of that position.

78. The UT determined that the second F-tT decision was to be set aside, on the basis that the F-tT judge had erred in law in assessment of the evidence. However, whether the finding in the second F-tT decision as to age should be regarded as a 'preserved finding' was directed by the UT to be dealt with as a preliminary point. Written arguments were put in by both sides. It was contended by the appellant that the finding as to age should be 'preserved'; the SSHD contended that the UT should have regard to the decision of Beatson J, and that such decision was binding on the UT.

79. The UT found that the decision that the appellant was a minor was tainted by a material error of law and could not be a preserved finding. The central conclusion was that there was no reliable evidence to support a finding that the appellant was the age he claimed to be, and the conclusions of Beatson J were adopted. The appellant was found to be an adult, that there would be no risk on return, and that there was no breach of Article 8 ECHR or other objection to removal. The F-tT decision was remade, upholding the dismissal of the appellant's appeal.

In the Court of Appeal

80. Amongst the arguments advanced by the appellant in the Court of Appeal was a contention that there had been procedural unfairness in the UT, including that the SSHD had not put in a UT rule 24 response seeking to challenge the determination of the F-tT as to age.

81. As to the point about there being no UT rule 24 response, the Court of Appeal stated that the objection did not confront the realities. It had been made clear at an early stage of the appeal process that age was very much an issue; that had been precisely why a direction had been given in the UT that there be a hearing as to whether or not the decision in the F-tT on age was to be a 'preserved finding'. In such circumstances, the UT had been entitled not to require formal service of a UT rule 24 response.

82. It was also contended by the appellant that the only point raised by the SSHD before the UT had been in effect one of law: whether the UT was bound by the decision of Beatson J on age. But while that was one way – perhaps the principal way – in which the argument was then (and wrongly) being advanced on behalf of the SSHD, it was not the only way: as the UT judge had appreciated. The prior written arguments had showed that the whole issue of age was at large, and that was the case the appellant should have been prepared to meet in the UT. There was no proper basis for saying that the UT was obliged to accept the finding of the F-tT as to age once the UT judge had rejected the argument (as he did) that he was bound by the finding of Beatson J. The various arguments were all, in substance, variations on the argument that the finding of the F-tT as to age should have been preserved by the UT. But that was a matter for evaluation by the UT.

83. It will be noted that the SSHD had been 'unsuccessful' in the F-tT on the issue of age, and that age was a ground on which the SSHD was to rely in the UT. If the (later) *Devani* interpretation had been considered correct, a UT rule 24 response had been required.

84. Again, the Court of Appeal saw no reason to conclude that provision of a UT rule 24 response was obligatory in the circumstances of the case. The crux, again, was fairness between the parties.

Observations on these 2 cases

85. It is suggested that these two Court of Appeal cases illustrate the following:
    (i) The UT's power and duty to consider an issue raised by a respondent, if an appellant should be prepared to meet it.
    (ii) That UT rule 24 is an important means of securing procedural fairness, on which the Tribunal will always insist. If an appellant is so taken by surprise by an issue being raised by a respondent, then the UT will exercise its discretion to adjourn the hearing, or to rule that the issue is not to be entertained.

(iii) There is no proper basis for saying that the UT is simply obliged to accept a finding by the F-tT (which a respondent wishes to challenge) in the absence of a UT rule 24 response.

86. We shall return below to the issues raised by the *Devani* case in terms of possible rule-change. It is convenient now to highlight some further issues regarding UT rule 24, as raised by the *SSE* case. In so doing, we shall set out more detail of that case.

Further issues and the *SSE* case

87. One issue regarding UT rule 24 is whether or not a cross-appeal (and thus a need for PTA), as opposed to relying on the terms of a respondent's UT rule 24 response, is required in circumstances where the F-tT's decision can be broken down into a number of different findings, some of which went the appellant's way, and some went against the appellant. This issue may be illustrated by the *SSE* case.

88. The *SSE* case concerned whether capital allowances were available in respect of a number of different structures constituting a hydroelectric power plant. The F-tT dealt with each of the structures concerned separately, and the taxpayer was largely successful before the F-tT.

89. However, the taxpayer had been unsuccessful before the F-tT as regards one type of structure – 'cut and cover' conduits. The F-tT held that these were 'aqueducts' and hence only part of the expenditure (not that incurred in fabricating the conduits) was allowable.

Appeal to the UT

90. HMRC appealed against those of the F-tT's findings that went against them, and in a UT rule 24 response the taxpayer sought to challenge the finding that went against the taxpayer – as to the 'cut and cover' conduits, seeking to gain full allowances.

91. The UT found that the taxpayer did not, in the circumstances, need PTA in respect of the finding in question. Its reasoning was as follows.

- Where a respondent is opposing an appeal but wishes to challenge a finding of the F-tT on a point which it argued before the F-tT but in respect of which it was unsuccessful, it can do so simply through a UT rule 24 response which it may (but need not) file.
- If a response is filed, then UT rule 24(3)(e) required the respondent to set out the grounds on which the respondent relies in the UT, which are to include "*any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal*". The respondent had met those requirements in its UT rule 24 response, specifying a number of arguments which it ran before the F-tT and which it wished to argue again.
- There was nothing in UT rule 24 that indicated that the rule was limited to arguments which simply seek to uphold the F-tT's decision on different grounds. Provided the argument was one that was before the F-tT, it was open to a respondent to argue the point again in the UT, provided it gave notice of that in its UT rule 24 response, without needing to apply for PTA.
- There was no conceivable prejudice to HMRC in that conclusion. The argument was squarely before the F-tT, and HMRC had had adequate notice of it. HMRC's counsel dealt with all of the respondent's arguments effectively, both in his skeleton argument and in oral submissions before the UT.
- The position would have been different had the argument concerned not been made before the F-tT. In those circumstances, it would have been necessary for the respondent to have made an application to the UT for permission to argue the point, and HMRC would have been entitled to make representations in opposition to the application.

In the Court of Appeal

92. It was held by the Court of Appeal that the taxpayer had been obliged to seek PTA (from the F-tT) in respect of the conduits issue, and within the time

permitted for so doing. As the taxpayer had not done so, and there had been no PTA, the taxpayer should not have been permitted to advance its arguments in the UT simply via the route of a UT rule 24 response. The reasoning of the Court was as set out in paragraphs 93 to 100 below.

93. The Court noted that the right to appeal from the F-tT to the UT is provided by section 11 of the TCEA (see paragraph 13 above). Section 12 of the TCEA provides that if, in deciding an appeal under section 11, the UT finds that the making of the decision concerned involved an error of law, it may (but need not) set aside the decision and remake it. In exercising that power, the UT may make any decision that the F-tT could make if the F-tT were remaking the decision, and may make such findings of fact as it considers appropriate.

94. The Court held that the procedure to be followed by a party seeking PTA is as follows:

- Rule 39 of the F-tT(TC) Rules provides that a person seeking PTA must make a written application to the Tribunal for permission within 56 days of the date on which the tribunal sends the relevant decision notice.
- If PTA is refused, the party may renew the application to the UT, pursuant to UT rule 21: a person may apply to the UT for PTA against the decision of the F-tT only if they have applied to the F-tT and the application has been refused or not admitted, or granted only on limited grounds. By UT rule 21(4), the application for PTA must state amongst other things the details of the decision challenged and the grounds on which the appellant relies.
- If the UT refuses PTA, it must send written notice of the refusal to the appellant: UT rule 22(1). If it gives PTA, then it sends written notice of the permission to each party, the application for PTA stands as the notice of appeal, and the UT must send each respondent a copy of the application for PTA and any documents provided with it by the appellant: UT rule 22(2)(a) and (b). Where the F-tT has already given PTA, the appellant

must provide a notice of appeal to the UT which then sends a copy of that notice and any accompanying documents to each respondent: UT rule 23.

- UT rule 24 then provides for the response to the notice of appeal. Any response must state, amongst other things, what is set out in UT rule 24(3)(f).

95. The Court noted that the procedure so established by section 11 of the TCEA, the F-tT(TC) Rules and the UT Rules is different from the procedure which operates under CPR 52.13. Under CPR 52.13 (see paragraph 32 above), a respondent may serve a respondent's notice which seeks PTA from the appeal court, as well as asking the appeal court to uphold the decision of the lower court for reasons different from, or additional to, those given by the lower court. The respondent does not therefore have to seek PTA first from the lower court within the time limit set for an initial appeal.

96. The Court held that according to the different procedure adopted under the tribunal rules, the respondent cannot seek PTA in a UT rule 24 response.

- A respondent in the position of the taxpayer in the *SSE* case which, once an appeal is on foot, wants to reverse a point decided against it in the F-tT must apply for PTA to the F-tT.
- If the time limit for doing so has expired, it must request an extension of time, giving the reasons why the application notice was not provided in time: see F-tT(TC) rule 39(4).
- At that stage, the F-tT will consider whether the proposed appeal meets the test for the grant of PTA and whether time should be extended. The latter point will require consideration of how far the respondent's appeal will enlarge the scope of the appeal and whether it is consistent with the overriding objective to grant PTA. The fact that the respondent's application would open up several new fronts in the appeal leading to a longer and more complicated hearing, does not rule out the grant of PTA.

- The original appellant is not entitled to insist that the scope of the appeal remains within the limited compass of the grounds that it has raised. The fact that a late application for PTA may widen the scope of the appeal is a risk that the appellant takes, if the respondent has properly arguable issues that could result in the appellant being worse off than if they had let the F-tT's decision lie.

97. The Court noted that the taxpayer had not sought PTA from the F-tT, and that the taxpayer accepted that it could not have sought PTA from the UT without first having made an unsuccessful application to the F-tT. UT rule 24(3)(f) could not obviate the need for PTA set out in section 11 of the TCEA. The grounds referred to in that rule are the grounds on which the party relies in its character as a respondent to an appeal. Certainly, if the respondent succeeded on an issue before the F-tT because the F-tT accepted one of a number of arguments while rejecting other arguments for the same result, the respondent can raise those unsuccessful arguments if its success is challenged on appeal by the opposing party. But the respondent cannot raise an issue which it lost before the F-tT unless it obtains PTA for itself.

98. The Court noted the arguments advanced for the taxpayer, which were as follows.

- The value of the expenditure disallowed by the F-tT was comparatively small. It would not have been worth the while of the taxpayer to appeal that point in isolation. Yet once the appeal was mounted by HMRC, the taxpayer wished to argue that the F-tT had erred in disallowing that part of the expenditure on the conduits which it did. It would be wrong to require a respondent in the taxpayer's position to have to lodge its own appeal, without knowing whether the other party is going to bring an appeal first.
- There is no requirement in the F-tT(TC) Rules that the opposing party is notified of an application for PTA having been made by a party. By the

time the respondent is made aware that a successful application has been made either to the F-tT or to the UT, the time limit in rule 39 of the F-tT(TC) Rules may well have passed. That would deprive the respondent of the opportunity then to lodge its own appeal.

- HMRC's concern that a broad interpretation of UT rule 24(3)(f) would entitle a respondent to re-run every issue on which it lost before the F-tT without the filter of the permission stage was alleviated by the UT's case management powers under UT rule 5. The UT must exercise those powers in a way which gives effect to the overriding objective in UT rule 2. The UT had expressly considered whether HMRC had been prejudiced by the taxpayer being able to argue as it had wished, and concluded that they had not.
- A 'venerable principle' was that the task of the F-tT and the UT is to arrive at the collection of the correct amount of tax: the UT was therefore entitled to give effect to the logic of its conclusion that the F-tT had erred in finding as it had found. That logic pointed to full allowances as regards the conduits.

99. As to these arguments, although the Court accepted that a party who has lost on a minor issue may well find itself in the same position as the taxpayer in the *SSE* case, neither the argument based on practicalities nor the ‘venerable principle’ could override the statutory requirement for PTA.

100. The Court also held that in considering whether a point raised in a UT rule 24 response can only be made if PTA is granted, the decision of the F-tT being challenged needs to be identified.

- The outcome in the UT in relation to the 'cut and cover' conduits had been the consequence of the UT having identified an error of law in the interpretation by the F-tT of the word 'aqueduct'.
- That issue had been before the UT because the grounds of appeal raised by HMRC in its appeal from the F-tT to the UT had challenged the F-tT's decision that a particular structure was not an aqueduct.

- In its UT rule 24 response, the taxpayer had submitted that the F-tT should have concluded that the 'cut and cover' conduits were not aqueducts. But the decision challenged in the UT rule 24 response was not as to the meaning of the word 'aqueduct', but that by the F-tT as to whether HMRC's closure notice was correct in disallowing the capital expenditure incurred on the 'cut and cover' conduits.
- Although the UT's decision had increased the amount of allowable expenditure, that result could only be achieved if the taxpayer had sought permission to do better than the partial allowance (as adjudged in the F-tT). As no such PTA had either been sought or granted, the UT had erred in concluding that the expenditure was recoverable in full.

High level choices outlined

101. There is much to consider, arising from the *Devani* and *SSE* cases. We seek now to draw some strands together in terms of what steps are open to the TPC (by way of possible amendment of rules) in light of those cases. We introduce various options, as ‘high level choices’. These are not all possible options as to ways forward, but it is hoped that they will provide sufficient context for responses to this Consultation to be informative.

102. Before turning to these in detail, the different ‘business’ and experience/considerations of the respective UT Chambers may lead to different conclusions as to each of these options, and more generally. We have described above the ‘business’ of the respective Chambers and shall discuss below different experience/considerations.

103. It is to be expected that parties who are commonly respondents in the UT will have views as to what will or may suit them in their particular jurisdictions. This applies to appeals/cross-appeals issues, as it does to UT rule 24 generally. In particular, it may be thought that ‘top down’ prescription of mandatory requirements (under UT rule 24) is perhaps not what is appropriate given the wide variety of cases that go to the UT, and wide variety of parties. Further, since the UT Rules apply across all Chambers it might be thought unappealing for any

drafting of Rules to distinguish between Chambers, but it may be done if considered appropriate.

104. With the above in mind, broad options for the TPC are as follows.

(i) To 'overrule' the *Devani* interpretation of UT rule 24, by rule change.

(ii) To make express in that rule the interpretation given in the *Devani* case.

(iii) To adjust the terms of UT rule 24 so as to conform more closely with CPR 52.13(2).

(iv) To widen the terms of UT rule 24 so as to conform more closely with CPR 52.13(2) and to accommodate applications for PTA.

(v) To make provision of a UT rule 24 response mandatory in all cases.

105. We turn now to experience/considerations across the UT Chambers.

Experience/considerations in the UT(IAC)

106. In terms of numbers of cases in which they are respondent, the greatest impact of rule change to UT rule 24 across the UT Chambers would likely be on the SSHD: more often than not, the respondent in appeals to the UT(IAC). It is understood that Home Office presenting officers may often get to see the file of the case they are presenting only very shortly before the hearing.

107. If a UT rule 24 response were to become mandatory to any extent, there is a case for saying that in the UT(IAC) it should be so whenever the respondent opposes the appeal, whether or not (s)he wishes to raise what the Court described in the *Devani* case as 'additional grounds' (i.e. those set out in UT rule 24(3)(e)). In an ideal world, having a UT rule 24 response sufficiently in advance of a planned hearing would enable the UT(IAC) to proceed without a hearing, where the respondent says (s)he will not be opposing the appeal.

108. However, it might be thought unclear what practical purpose would be served by introducing a mandatory element in UT rule 24. The UT would still have to consider whether, as in the *Devani* case itself, to exercise discretion. If a UT rule 24 response was late, but made for example some compelling points about the legal soundness of the F-tT(IAC) decision, it is difficult to see why a breach of the

UT Rules should affect the way the UT(IAC) should (and would) proceed. That is particularly true if to leave the F-tT decision undisturbed would involve a breach of the Refugee Convention or some unqualified human right. And what if the UT had, in fact, independently come to the same conclusion as the respondent, from pre-reading the case?

109. It is always open to the UT in a particular case to direct that a UT rule 24 response is filed. This can be done when the UT grants PTA (if it does so) or through case management where the F-tT has granted such permission.

110. If a UT rule 24 response is mandatory only if the respondent wishes to rely on grounds on which it had been unsuccessful in the F-tT (i. e. the interpretation in the *Devani* case) that might be thought odd. For example, what if the proposed ground is wholly new (c.f. CPR 52.13.2(b) – see above)?

111. As to the relationship between section 11 of the TCEA and UT rule 24 (see the *SSE* case), the UT(IAC) has considered issues arising in the following cases:

- *EG and NG (UT rule 17: withdrawal; rule 24: scope)* [2013] UKUT 143
- *Ved (appealable decision; permission application: Basnet)* [2014] UKUT 150
- *Smith (appealable decisions; PTA requirements; anonymity)* [2019] UKUT 216 (citing from *EG* and *Ved*)
- *Binaku (s 11TCEA; s117C NIAA; para. 339D)* [2021] UKUT 34.

112. It is considered that the consequences of an ‘expansive’ reading of the *SSE* case would be very unfortunate for the UT(IAC). A person who wins in the FtT(IAC) and obtains everything they want, in terms of leave to remain in the UK, should not have to make a ‘protective’ application to the F-tT for PTA to the UT, just in case the SSHD decides to appeal against the decision of the F-tT. This would give rise to a significant burden on parties and on the tribunal system. If there were no ‘protective’ application for PTA, and the SSHD does appeal, then unless the matter can be resolved procedurally in the UT, so as to enable all relevant matters (e.g. Articles 3 and 8 ECHR) to be adjudicated, there would be

the risk of a fresh application being made to the Home Office, with all the attendant delay and inconvenience.

113. In order to avoid these problems, the UT(IAC) has sought to make 'materiality' the touchstone of when a party should be required to seek PTA, as opposed to raising the issue in a UT rule 24 response. This may not be considered 'elegant'; but that test is considered to meet the realities of the matter and the requirements of the overriding objective.

114. It is considered that the *SSE* case probably should be read 'narrowly'. There is a case for saying that the *SSE* case is compatible with the above UT(IAC) cases, in that the taxpayer in the *SSE* case did not get 'everything it wanted' from the decision of the F-tT and that there was a material (albeit perhaps financially modest) difference between what it wanted and what it achieved. If an appellant in the F-tT(IAC) gains a particular period of years Leave to Remain on Article 8 grounds and would have achieved the same had they won on Article 3 grounds, there is no material difference.

115. Further, as held by the UT(IAC) in the *Ved* case, there is no absolute requirement to ask the FtT for PTA before asking for it from the UT: the requirement can be waived under UT rule 7 (see paragraph 23 above), if consistent with the overriding objective.

Experience/considerations in the UT(AAC)

116. It might be thought that what UT rule 24 requires, and whether a response under that rule is mandatory or not, ultimately does not matter if (a) its terms do not cause problems in most cases; and (b) it can be tailored for other cases.

117. The UT(AAC) makes case management directions for a respondent's response to the grounds of appeal. This provides flexibility while ensuring that both parties state their case at an early point. Case management directions have the necessary flexibility, as the UT(AAC) deals with numerous kinds of respondent.

Some respondents play a full part in the appeal (e. g. individuals who won the case in the F-tT, and where the Secretary of State, or a local authority, appeals). Some respondents use a UT rule 24 response to concede the appeal or adopt a neutral stance. Some respondents play little part in the appeal (e.g. a second respondent may defer to the Information Commissioner in FOI appeals).

118. As such, within the UT(AAC) there seems to be no reason to change the UT Rules (and UT rule 24 in particular); they work satisfactorily for the UT(AAC) and enable all parties to an appeal to know the case against them. Rather, there may be concerns about a requirement for a mandatory UT rule 24 response for respondents who are LIPs. The UT(AAC) can 'case manage' LIPs, but cannot be sure that they are familiar with the UT Rules. It is understood that most respondents comply with directions; and where they do not, a reminder is sent.

119. The UT generally has a duty to ensure that public law rights are granted to those who merit them and are not granted to those who do not. It is considered that there is only so far that the UT(AAC) can lawfully adopt a 'pleadings-based' approach. (For example, if a government department in a welfare benefits case did not respond to the appeal, it would not automatically be allowed as this could result in a person receiving public funds by way of a windfall.)

120. From the perspective of the UT(AAC), it might be thought to be a fundamental mistake to draft, by reference to a single model of proceedings, a set of rules of procedure that, in terms of <u>mandatory</u> obligations, will apply to a wide range of jurisdictions. What suits a case with clearly distinct and carefully defined issues raised by different parties, each represented by specialist counsel, will not suit other cases. An illustration may be given. There may be a series of (for example) interrelated child support appeals, with both LIP parents appealing against a single decision to the F-tT (where there are now two cases, possibly in different regions). Suppose each parent challenges aspects of both F-tT decisions by appeal to the UT (where there will now be four cases). Then add in, as is conceivable, a series of original child support decisions for successive periods, and for good measure some additional parents with care whose children cease to qualify at different dates during the periods. The appeals will be multiplied at each level accordingly.

121. If there must be rule change to UT rule 24, it is suggested that one possible solution is to have a basic rule that could be left to apply in the simplest cases with the power to give appropriately tailored directions for anything out of the ordinary or to suit the particular jurisdiction.

122. As for the *SSE* case, it is understood that the UT(AAC) can find little or no advantage – and some disadvantage – for its work in the need first to seek PTA from the F-tT. The decision in the *SSE* case potentially affects the way the UT(AAC) works in two contexts, described below.

123. The first context is where a prospective appellant applies to the UT for PTA without first seeking it from the F-tT. Although this does not happen that often, it is nevertheless a regular occurrence in the UT(AAC). When it happens, there is a general practice in the UT(AAC) not to require the prospective appellant to 'go round in a circle', instead relying on waiver under UT rule 7 (if consistent with the overriding objective). The UT(AAC) considers that it is free to continue with that practice.

124. The second context is that of the cross appeal. This produces two issues. One is the 'no application to the F-tT for PTA' issue, which may be dealt with by waiver (see above). The other issue is the 'need for PTA issue', which will now give rise to more difficulty given the way the Court in the *SSE* case dealt with the issue as one of interpretation of UT rule 24 (see paragraph 97 above). It is thought that in practice, the UT(AAC) will continue as before and be able to 'work round' this issue if the circumstances justify this. The Court in the *SSE* case assumed, without analysing the terms of the rules or considering the relevance of the terms of the grant of PTA, that the scope of an appeal is limited by the grounds of appeal. That is not however how the UT(AAC) deals with social security and child support appeals and may provide the UT(AAC) with a ground for distinguishing the Court's decision in the *SSE* case.

125. The above considerations are thought to underline the importance of the flexible approach which the UT(AAC) overall favours.

Experience/considerations in the UT(TCC)

126. In the UT(TCC), it is considered that a change to identify that it is mandatory to put in a UT rule 24 response notice if the respondent intends to rely on a ground on which it was unsuccessful before the F-tT would be welcome. That said, there may be slight concern (but theoretical rather than based on experience) that it might add a layer of confusion or difficulty for LIP taxpayers who had succeeded in front of the F-tT. Nevertheless, there may be benefit in a proper use of a clearly expressed UT rule 24 in identifying at an early stage those matters put in issue by the respondent.

127. The *SSE* case was what might be termed a 'multi-decision' case, arising in a tax case. The UT(TCC) deals with many tax cases which may be multi-decision cases, or which may feature distinct issues some of which are resolved in favour of the taxpayer in the F-tT and others resolved against the taxpayer. It may be difficult to identify those respondents who need to apply for PTA to rely on grounds on which they were unsuccessful below, as distinct from those who do not need such permission.

128. Some illustrations may be given.

- In *Adelekun v HMRC* [2020] UKUT 0244 (TCC), a taxpayer appealed to the UT. Two issues had been before the F-tT: (i) the date of VAT registration, on which the taxpayer had lost; and (ii) whether personal services plus advisory services were a 'composite supply', on which the taxpayer had won. HMRC had not appealed against the latter conclusion, but applied late for permission to add a new ground to its UT rule 24 response. The UT considered this new ground to be a 'new ground of appeal', there was no good explanation for HMRC delay (amongst other reasons), and HMRC's application for permission to add the new ground was rejected.
- In *Eynsham Cricket Club* [2019] UKUT 0047 (TCC), a case management decision was made by the UT in a taxpayer appeal. HMRC accepted that the F-tT decision was made on a basis that was wrong in law, but it wished to introduce a new argument on the basis of which it contended that the F-tT's conclusion could still stand. HMRC had served a UT rule 24 response wrongly referring to a

'cross-appeal', whereas they had won in the F-tT decision. There was a heavy burden imposed on a party seeking to justify arguing a new point on appeal, and permission was refused to argue the new point.

- In *Union Castle Mail Steamship* [2018] UKUT 0316 (TCC), a taxpayer appealed to the UT on the basis that the F-tT had been wrong to hold that a particular debit was not a 'loss' for computing corporation tax. HMRC's UT rule 24 response contended that the F-tT's decision was correct, but also that if there was a loss, (i) it did not arise from the relevant contract (the F-tT had got that wrong); and (ii) the debit did not fairly represent a loss arising from the contract (F-tT had also got that wrong) and that in any event the effect of transfer pricing would reduce to nil the amount deductible for the debit (F-tT had also got that wrong). The taxpayer argued that HMRC needed PTA on the transfer pricing issue. The UT held that no PTA was required, since HMRC had been the winner in the F-tT. As such, it could not appeal the decision, which had been that the taxpayer appeal against the closure notice was dismissed.
- In *HMRC v Higgins* [2018] UKUT 0280 (TCC), HMRC appealed to the UT on the basis that the F-tT was wrong to hold no CGT was payable on the sale of a property, as it had taken a wrong approach to period of ownership. The taxpayer sought to argue in the UT that if HMRC were correct on that, there should be a just and reasonable apportionment of relief. This had not been argued by the taxpayer in the F-tT, and HMRC objected to the argument on grounds that the taxpayer had not sent a timely UT rule 24 response, with no reason advanced as to why not, and that in any event, that issue would require further evidence not before the F-tT. The UT held that the point sought to be argued by the taxpayer had no merit, and refused permission to advance the argument on that basis.
- In *GDF Suez v HMRC* [2017] UKUT 0068 (TCC), a taxpayer appealed to the UT. The case concerned a tax avoidance scheme. There had been 4 issues in the F-tT, which had determined 3 issues (accounting issues) in favour of the taxpayer, and the fourth issue in favour of HMRC. On the basis of the fourth issue, the taxpayer's appeal had been dismissed in the F-tT. HMRC had stated in a UT rule 24 response only that they relied on the 'same grounds' as below, yet HMRC wished to challenge the F-tT's decisions on facts as regards issues 1-3. That was held by the UT to be a different exercise (in the UT) to that before the F-tT, and that as such HMRC required permission from the UT to argue those points.

Permission was granted by the UT, since there was no unfairness to the taxpayer.

- In *HMRC v SDM European Transport* [2015] UKUT 625 (TCC), HMRC appealed to the UT. The case concerned 65 movements of excise goods, the issue being whether they had arrived at their destination. The F-tT had found in favour of the taxpayer by concluding that in all but two movements the goods had arrived. HMRC appealed against that decision, and in a UT rule 24 response the taxpayer challenged the F-tT's conclusion on one of the two movements on which the taxpayer had lost. HMRC argued that provision of the UT rule 24 response was insufficient, and that PTA should have been sought by the taxpayer before the UT could consider the point. The UT held that an appellant who had been largely successful before the F-tT can appeal, without first securing PTA, against any finding in the F-tT's decision adverse to it once it has been served with a notice of appeal by the party largely unsuccessful before the FtT. (This case would now be decided differently, following the *SSE* case.)

Options in detail

Option 1: To 'overrule' the *Devani* interpretation, by rule change to UT rule 24

129. The purpose of 'overruling' the *Devani* interpretation would be to maintain flexibility for the UT, across all Chambers. In the UT(IAC) in particular, the SSHD may have particular views as to what the law should be, notwithstanding the *Devani* interpretation.

130. It may be thought to make sense for the UT/appellant to know in good time – ideally - what is the respondent's position, but directions may be given, in any event to the same effect. The need to avoid being taken by surprise may be catered for by a direction as needs be. When a notice of appeal is sent to a respondent, a standard direction might be given: *'if you wish to rely on […] you must provide a rule 24 notice'*. That way, the obligation may be tailored to the specific UT Chamber, and the specific case.

131. Indicative drafting (directed to 'overruling' the *Devani* interpretation) would be as follows:

24.— Response to the notice of appeal

(1A) Subject to any direction given by the Upper Tribunal, a respondent may provide a response to a notice of appeal.
(1B) In the case of an appeal against the decision of another tribunal, a respondent is not obliged to provide a response to a notice of appeal only by reason that the respondent intends to rely on grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal.
(2) …
(3) The response must state—
(a) the name and address of the respondent;
(b) the name and address of the representative (if any) of the respondent;
(c) an address where documents for the respondent may be sent or delivered;
(d) whether the respondent opposes the appeal;
(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal; and
(f) whether the respondent wants the case to be dealt with at a hearing.

Question 1

132. Do you consider that the *Devani* interpretation should be 'overruled' by rule change? If so, why; and if not, why not?

Question 2

133. If so, do you have any comments on the indicative drafting?

Option 2: To make express in the rule the interpretation given in the *Devani* case

134. It might be thought unsatisfactory for case law alone to be the source of the obligation as imposed by the *Devani* interpretation. However, there is also the possibility of standard/tailored directions. If the effect of the *Devani* interpretation is flagged at the outset, by a direction to a respondent, might that be considered appropriate and sufficient?

135. Indicative drafting (directed only to making the *Devani* interpretation express) would be as follows:

24.— Response to the notice of appeal

(1A) Subject to any direction given by the Upper Tribunal, a respondent may provide a response to a notice of appeal.
(1B) In the case of an appeal against the decision of another tribunal, a respondent who relies on any grounds on which the respondent was

unsuccessful in the proceedings which are the subject of the appeal, must provide a response to a notice of appeal.
(2) …
(3) The response must state—
(a) the name and address of the respondent;
(b) the name and address of the representative (if any) of the respondent;
(c) an address where documents for the respondent may be sent or delivered;
(d) whether the respondent opposes the appeal;
(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal; and
(f) whether the respondent wants the case to be dealt with at a hearing.

Question 3

136. Should the *Devani* interpretation be made express in the Rules? If so, why; and if not, why not?

Question 4

137. If so, do you have any comments on the indicative drafting?

Option 3: To adjust the terms of UT rule 24 so as to conform more closely with CPR 52.13(2)

138. The purpose of adjusting UT rule 24 so as to conform more closely with CPR 52.13(2) would be to accommodate for example the 'wholly new' ground (see paragraph 110 above, and the *Eynsham Cricket Club* case in paragraph 128 above), in conjunction with the mandatory obligation anticipated by Option 2.

139. Indicative drafting would be as follows:

24.— Response to the notice of appeal

(1A) Subject to any direction given by the Upper Tribunal, a respondent may, and if paragraph (1B) applies must, provide a response to a notice of appeal.
(1B) in the case of an appeal against the decision of another tribunal, a respondent who wishes the Upper Tribunal to uphold the decision for reasons other than those given by the tribunal must provide a response to a notice of appeal.
(2) …
(3) The response must state—
(a) the name and address of the respondent;
(b) the name and address of the representative (if any) of the respondent;
(c) an address where documents for the respondent may be sent or delivered;

(d) whether the respondent opposes the appeal;
(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent relies to uphold the decision for reasons other than those given by the tribunal; and
(f) whether the respondent wants the case to be dealt with at a hearing.

Question 5

140. Should the terms of UT rule 24 be widened so as to conform more closely with CPR15.13(2)? If so, why; and if not, why not?

Question 6

141. If so, do you have any comments on the indicative drafting?

Option 4: To widen the terms of UT rule 24 so as to conform more closely with CPR 52.13(2) and to accommodate applications for permission to appeal

142. There are several aspects to consider.

- A respondent may have succeeded in the F-tT and because it was the successful party it could not appeal against a decision in its favour.
- A respondent may however wish the UT to uphold the F-tT's decision for reasons additional to or other than those given by the F-tT.
- A respondent may also wish to pursue a further argument which was not argued in the F-tT.
- Permission may be needed from the UT to allow the respondent to argue points in the UT.
- The permission needed may be a PTA, in circumstances in which PTA had not first been sought from the F-tT.

143. The Court of Appeal held in the *SSE* case that a person is not allowed to "appeal" to the UT until they have first sought permission from the F-tT, and that UT rule 24 applies only to grounds that a person wishes to raise in the capacity of respondent.

144. Discussion above (see paragraphs 21 to 23, 111 to 115, 122 to 124) suggests that there are concerns as to the underlying basis of the decision in the *SSE* case and as to its consequences. Perhaps consequences may be 'worked

round', but it may be possible to adjust the terms of UT rule 24 so as to avoid potential difficulties, specifically as to issues of PTA.

145. If it were considered that the effect of the *SSE* case should be reversed, so as to permit a party in the position of the respondent in that case to be free to contend that it should be permitted by the UT to argue points on which it had lost in the F-tT (yet as regards which it did not seek PTA from the F-tT), rule change could expressly provide that an application for PTA may be made in a UT rule 24 response, in respect of grounds on which the respondent was unsuccessful in the F-tT. Rule change would also have to provide that a person who so applies for PTA to the UT does not first need to apply to the F-tT for PTA.

146. The practical result sought to be achieved would be as follows. If a respondent wishes to raise again points on which it lost in the F-tT, it must file a UT rule 24 response setting out those grounds. The respondent may or may not need PTA, depending on whether the F-tT decision is in reality a number of separate decisions. If the respondent wishes to raise grounds not argued before the F-tT, again it must be made clear in the UT rule 24 response, setting out the grounds. The respondent would need permission to run such arguments, and at that point the UT can consider not only whether the 'arguability' threshold is crossed but also whether it is right to allow the new point to be argued, applying the appropriate principles. In that regard, the UT would seek representations from the appellant.

147. Indicative drafting would be as follows:

24.— Response to the notice of appeal

(1A) Subject to any direction given by the Upper Tribunal, a respondent may, and if paragraph (1B) applies must, provide a response to a notice of appeal.
(1B) In the case of an appeal against the decision of another tribunal, a respondent must provide a response to a notice of appeal if the respondent:
(a) wishes the Upper Tribunal to uphold the decision for reasons other than those given by the tribunal; or
(b) relies on any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal

(1C) If paragraph (1B) (a) or (b) applies, to the extent that the respondent needs any permission, including permission to appeal to the Upper Tribunal, the response must include an application to the Upper Tribunal for such permission.
(2) …
(3) The response must state—
(a) the name and address of the respondent;
(b) the name and address of the representative (if any) of the respondent;
(c) an address where documents for the respondent may be sent or delivered;
(d) whether the respondent opposes the appeal;
(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds
(i) to uphold the decision for reasons other than those given by the tribunal; or
(ii) on which the respondent was unsuccessful in the proceedings which are the subject of the appeal;
(f) the reasons why any permission applied for under paragraph (1C) should be given; and
(g) whether the respondent wants the case to be dealt with at a hearing.

148. By reference to the indicative drafting, UT rule 24(1B)(a) would cater for 'new points' (not raised before the F-tT), and UT rule 24(1B)(b) would cater for 'old points' (as raised before the F-tT), where it is said that the F-tT determined those old points wrongly. With both new points and old points, there is also the question whether PTA is needed, which is catered for by UT rule 24(1C). New points may also raise an additional issue, namely whether in applying the appropriate principles, the UT should exercise its general discretion to allow a point to be run for the first time on appeal. That too is catered for by UT rule 24(1C).

149. If that drafting approach is correct, there remains the issue of whether the respondent may apply for PTA in its UT rule 24 response without the need to apply to the F-tT first.

150. It is considered that this may be achieved by amending UT rule 21 to state that such rule does not apply to an application for PTA made in a UT rule 24 response. It is considered that this step would respect the statutory scheme. Section 11(4) of the TCEA states that PTA must be given by either the UT or the F-tT. It does not impose a statutory requirement that the F-tT must be asked first.

151. The suggestion would be to insert (by indicative drafting) into UT rule 21, a new paragraph(1A):

(1A) This rule does not apply to an application for permission to appeal to the Upper Tribunal if such application is made under rule 24 (response to the notice of appeal).

Question 7

152. Should the terms of UT rule 24 be widened so as to conform more closely with CPR15.13(2) and to accommodate applications for permission to appeal? If so, why; and if not, why not?

Question 8

153. If so, do you have any comments on the indicative drafting?

Option 5: To make provision of a UT rule 24 response mandatory in all cases

154. It might be thought difficult to advocate for mandatory UT rule 24 responses in all appeals. If there is to be an obligation to put in a response, there is always discretion to accept a late response. It might be thought wasteful to require it in the ordinary case of simply opposing the appeal for the reasons already given by the F-tT. The present 'simple' rule may be all that is needed: i. e. no obligation to put in a UT rule 24 response.

155. If, however, a UT rule 24 response was to become mandatory, indicative drafting would be as follows.

24.— Response to the notice of appeal
(1A) Subject to any direction given by the Upper Tribunal, a respondent must provide a response to a notice of appeal.
(2) …
(3) The response must state—
(a) the name and address of the respondent;
(b) the name and address of the representative (if any) of the respondent;
(c) an address where documents for the respondent may be sent or delivered;
(d) whether the respondent opposes the appeal;
(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds on which

the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal; and
(f) whether the respondent wants the case to be dealt with at a hearing.

156. If the terms and effect of CPR 52.13(2) were also to be reflected (see Option 3 above), then paragraph (3)(e) might be as follows (by indicative drafting):

(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent relies <u>to uphold the decision for reasons other than those given by the tribunal</u>;

<u>Question 9</u>

157. Should a UT rule 24 response be mandatory in all cases? If so, why; and if not, why not?

<u>Question 10</u>

158. If so, do you have any comments on the indicative drafting?

<u>Consultation Questions</u>

159. The TPC is interested to receive your views on possible changes to the UT Rules, including your replies to the questions below. 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.

<u>Question 1</u>

Do you consider that the *Devani* interpretation should be 'overruled' by rule change to UT rule 24 (Option 1)? If so, why; and if not, why not?

Question 2

If so, do you have any comments on the indicative drafting?

Question 3

Should the *Devani* interpretation be made express in the Rules (Option 2)? If so, why; and if not, why not?

Question 4

If so, do you have any comments on the indicative drafting?

Question 5

Should the terms of UT rule 24 be adjusted so as to conform more closely with CPR. 13.2 (Option 3)? If so, why; and if not, why not?

Question 6

If so, do you have any comments on the indicative drafting?

Question 7

Should the terms of UT rule 24 be widened so as to conform more closely with CPR. 13.2 and to accommodate applications for permission to appeal (Option 4)? If so, why; and if not, why not?

Question 8

If so, do you have any comments on the indicative drafting?

Question 9

Should a UT rule 24 response be mandatory in all cases (Option 5)? If so, why; and if not, why not?

Question 10

If so, do you have any comments on the indicative drafting?

Generally

Question 11

Do you have any further comments?

How to Respond

Please reply using the response questionnaire template.

Please send your response by **13 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

ANNEX A

UT Rules 23 to 25

Notice of appeal

23.—(1) This rule applies—

(a) to proceedings on appeal to the Upper Tribunal for which permission to appeal is not required, except proceedings to which rule 26A, 26B or 26C applies;

(b) if another tribunal has given permission for a party to appeal to the Upper Tribunal; or

(c) subject to any other direction by the Upper Tribunal, if the Upper Tribunal has given permission to appeal and has given a direction that the application for permission to appeal does not stand as the notice of appeal.

(1A) In an asylum case or an immigration case in which the First-tier Tribunal has given permission to appeal, subject to any direction of the First-tier Tribunal or the Upper Tribunal, the application for permission to appeal sent or delivered to the First-tier Tribunal stands as the notice of appeal and accordingly paragraphs (2) to (6) of this rule do not apply.

(2) The appellant must provide a notice of appeal to the Upper Tribunal so that it is received within 1 month after—

(a) the date that the tribunal that gave permission to appeal sent notice of such permission to the appellant; or

(b) if permission to appeal is not required, the date on which notice of decision to which the appeal relates—

(i) was sent to the appellant;

(ii) in a quality contracts scheme case, if the notice was not sent to the appellant, the date on which the notice was published in a newspaper in accordance with the requirement of section 125 (notice and consultation requirements) of the Transport Act 2000

(iii) in a trade remedies case—

(aa) where the appeal is against a decision made by the TRA and notice is required to be published in accordance with the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019, the date of such publication or (if later) when the notice comes into effect;

(bb) where the appeal is against a decision made by the TRA and no notice is required to be published in accordance with the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019, the date on which the appellant is notified of the decision, or

(cc) where the appeal is against a determination of the Secretary of State under the Taxation (Cross-border Trade) Act 2018, the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019, the Trade Remedies (Increase in Imports Causing Serious Injury to UK Producers) (EU Exit) Regulations 2019 or the Trade Remedies (Reconsideration and Appeals) (EU Exit) Regulations 2019 (as the case may be), the date on which the notice is published in accordance with the relevant provision or (if later) when the notice comes into effect;

(3) The notice of appeal must include the information listed in rule 21(4)(a) to (e) (content of the application for permission to appeal) and, where the Upper Tribunal has given permission to appeal, the Upper Tribunal's case reference.

(4) If another tribunal has granted permission to appeal, the appellant must provide with the notice of appeal a copy of—

(a) any written record of the decision being challenged;

(b) any separate written statement of reasons for that decision; and

(c) the notice of permission to appeal.

(5) If the appellant provides the notice of appeal to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—

(a) the notice of appeal must include a request for an extension of time and the reason why the notice was not provided in time; and

(b) unless the Upper Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Upper Tribunal must not admit the notice of appeal.

(6) When the Upper Tribunal receives the notice of appeal it must send a copy of the notice and any accompanying documents—

(a) to each respondent;

(b) in a road transport case, to—

(i) the decision maker;

(ii) the appropriate national authority; and

(iii) in a case relating to the detention of a vehicle, the authorised person; or

(c) in an appeal against a decision of a traffic commissioner pursuant to section 6F of the Transport Act 1985 or section 123T of the Transport Act 2000, to—

(i) the respondent, and

(ii) the traffic commissioner who was the decision maker.

(6A) In a case to which paragraph (6)(c) applies, the Upper Tribunal must at the same time require such commissioner to—

(a) send or deliver to the Upper Tribunal (within such time as the Upper Tribunal may specify)—

(i) a copy of any written record of the decision under challenge, and any statement of reasons for that decision, and

(ii) copies of all documents relevant to the case in such commissioner’s possession, and

(b) provide copies of such documents to each other party at the same time as they are provided to the Upper Tribunal.

(7) Paragraph (6)(a) does not apply in a quality contracts scheme case, in respect of which Schedule A1 makes alternative and further provision.

24.— Response to the notice of appeal

(1) This rule and rule 25 do not apply to—

(a) a road transport case, in respect of which Schedule 1 makes alternative provision; or

(b) a financial sanctions case in respect of which Schedule 4 makes alternative provision.

(1A) Subject to any direction given by the Upper Tribunal, a respondent may provide a response to a notice of appeal.

(2) Any response provided under paragraph (1A) must be in writing and must be sent or delivered to the Upper Tribunal so that it is received—

(a) if an application for permission to appeal stands as the notice of appeal, no later than one month after the date on which the respondent was sent notice that permission to appeal had been granted;

(ab) in a quality contracts scheme case, no later than 1 month after the date on which a copy of the notice of appeal is sent to the respondent; or

(b) in any other case, no later than 1 month after the date on which the Upper Tribunal sent a copy of the notice of appeal to the respondent.

(3) The response must state—

(a) the name and address of the respondent;

(b) the name and address of the representative (if any) of the respondent;

(c) an address where documents for the respondent may be sent or delivered;

(d) whether the respondent opposes the appeal;

(e) the grounds on which the respondent relies, including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal; and

(f) whether the respondent wants the case to be dealt with at a hearing.

(4) If the respondent provides the response to the Upper Tribunal later than the time required by paragraph (2) or by an extension of time allowed under rule 5(3)(a) (power to extend time), the response must include a request for an extension of time and the reason why the response was not provided in time.

(5) When the Upper Tribunal receives the response it must send a copy of the response and any accompanying documents to the appellant and each other party.

(6) Paragraph (5) does not apply in a quality contracts scheme case, in respect of which Schedule A1 makes alternative and further provision.

25.— Appellant's reply

(1) Subject to any direction given by the Upper Tribunal, the appellant may provide a reply to any response provided under rule 24 (response to the notice of appeal).

(2) Subject to paragraph (2A), any reply provided under paragraph (1) must be in writing and must be sent or delivered to the Upper Tribunal so that it is received within one month after the date on which the Upper Tribunal sent a copy of the response to the appellant.

(2A) In an asylum case or an immigration case, the time limit in paragraph (2) is one month after the date on which the Upper Tribunal sent a copy of the response to the appellant, or five days before the hearing of the appeal, whichever is the earlier.

(2B) In a quality contracts scheme case, the time limit in paragraph (2) is 1 month from the date on which the respondent sent a copy of the response to the appellant.

(3) When the Upper Tribunal receives the reply it must send a copy of the reply and any accompanying documents to each respondent.

(4) Paragraph (3) does not apply in a quality contracts scheme case, in respect of which Schedule A1 makes alternative and further provision.

ANNEX B

The First-tier Tribunal Chambers

Social Entitlement Chamber

This Chamber is responsible for handling appeals against decisions relating to:

- Attendance Allowance
- Bereavement Allowance
- Carer's Allowance
- Child Benefit
- child maintenance (child support)
- Compensation Recovery Scheme (including NHS recovery claims)
- Diffuse Mesotheliomia Payment Scheme
- Disability Living Allowance
- Employment Support Allowance
- funeral payments
- Guardian's Allowance
- Income Support
- Industrial Injuries Disablement Benefit
- Jobseeker's Allowance
- Maternity Allowance
- Pension Credit
- Personal Independence Payment
- Sure Start Maternity Grant
- tax credits
- Universal Credit

- Vaccine Damage Payment
- Winter Fuel Payment

Health, Education & Social Care Chamber

This Chamber deals with Special Education Needs & Disability (SEND), Care Standards (CS), and Primary Health Lists (PHL).

- The SEND jurisdiction deals with parents'/carers appeals against decisions of local authorities about children's special educational needs.
- Care Standards hearings principally concern regulatory breaches enforced by the Care Quality Commission and Ofsted against whom appeals are heard.
- Primary Health Lists appeals, in the main, concern a refusal by the National Health Service Commissioning Board to allow doctors, dentists or pharmacists to practice on behalf of the NHS.

- It is also responsible for handling applications for the discharge of patients detained in psychiatric hospitals

- It also handles applications to change community treatment orders and the conditions placed on a 'conditional discharge' from hospital.

War Pensions and Armed Forces Compensation Chamber

This Chamber deals with appeals against decisions about a war pension or compensation.

General Regulatory Chamber

This Chamber is responsible for handling appeals against decisions made by government regulatory bodies in cases relating to:

- charities
- community right to bid
- consultant lobbyists
- conveyancing
- copyright licensing
- driving instructors
- electronic communications and postal services
- environment
- exam boards
- food
- gambling
- immigration services
- information rights

- letting and managing agents
- microchipping dogs
- pensions regulation
- secondary ticketing
- welfare of animals

Immigration and Asylum Chamber

This Chamber is responsible for handling appeals against some decisions made by the Home Office relating to:

- permission to stay in the UK
- deportation from the UK
- entry clearance to the UK

It also handles applications for immigration bail from people being held by the Home Office on immigration matters.

Tax Chamber

This Chamber is responsible for handling appeals against some decisions made by HMRC relating to:

- Income Tax
- PAYE tax
- Corporation Tax
- Capital Gains Tax
- National Insurance Contributions
- Statutory Sick Pay
- Statutory Maternity Pay
- Inheritance Tax
- VAT
- Excise duty
- Customs duty

It also handles some appeals relating to goods seized by either HM Revenue and Customs or Border Force and against some decisions made by the National Crime Agency.

ANNEX C

1. In May 2008, the Government announced its proposal to seek Parliamentary approval for the creation of the F-tT and the UT and the transfer to those tribunals of the functions of nine existing tribunals on 3 November 2008. It was proposed to create two chambers in the F-tT (SEC and HESCC) and one chamber in the UT: the UT(AAC). Other chambers in the F-tT and the UT would follow in 2009. In particular, the F-tT(Tax) and a Finance and Tax Chamber of the UT (what became the UT(TCC)) would be created on 1 April 2009.

2. The initial task of the TPC was to create rules for the chambers being created on 3 November 2008.

First consultation

3. Draft rules for the F-tT (SEC) were published on the Tribunal Service website on 28 May 2008, followed by draft rules for the F-tT (HESC) on 30 May, and draft rules for the UT on 1/2 June. The link to the website was sent to over 250 key stakeholders, organisations, individuals and respondents to previous consultations.

4. The draft UT Rules included a rule 26:

- by (1), a response to the notice of appeal was permissive ("*may send"*), to be provided no later than 1 month after receipt of notice of appeal or notice that the UT had granted leave to appeal
- by (2) a response "*must state"* … *"(e) the grounds on which the respondent intends to rely"*
- by (3), "*If a respondent wishes to exercise a right of appeal* [in respect of a decision by a relevant tribunal] *in relation to the same decision as the appellant's appeal, the respondent must provide a response in accordance with paragraph (1) and must include in the response an application for permission to appeal* …"
- by (5), if the respondent provides the response to the Upper Tribunal later than the time required by paragraph (1) or by an extension of time allowed under rule 5 (power to extend time), the response must include a request for an extension of time and the reasons why the response was not provided in time

5. The consultation period closed on 11 July 2008. A total of 145 responses were received; of these, there were 12 responses to the consultation which were concerned with the UT Rules. None raised any points arising from draft rule 26.

6. The responses were collated and discussed by the TPC, and second drafts of the rules were compiled in August 2008. These were similarly made available on the website, and the link provided to all respondents and stakeholder organisations. In the second draft of the UT Rules, draft UT rule 26 had become draft UT rule 24.

- by (1), the response remained permissive, but the paragraph commenced "*Subject to any direction given by the Upper Tribunal"*
- time limits were in (2)
- by (3), a response "*must state*" … '*the grounds on which the respondent intends to rely, including (in an appeal from the decision of another*

tribunal) any grounds on which the respondent was unsuccessful in the proceedings before the other tribunal but intends to rely in the appeal'

- by (4), the 'late provision' paragraph was retained
- there was no equivalent to the earlier draft UT rule 26(3) – application for permission to appeal

7. At a very late stage, the Government proposed that there should be a separate War Pensions and Armed Forces Compensation Chamber of the F-tT to replace the Pensions Appeal Tribunal (England and Wales), whose functions had originally been destined for the F-tT(SEC). This resulted in further draft rules for the F-tT(WPAFCC), following the draft rules for the F-tT(SEC), but with some amendments concerned solely with the WPAFC jurisdiction.

8. On 15 October 2008 the rules were laid before Parliament and came into effect on 3 November 2008.

9. In the UT Rules as so made in 2008, the wording of UT rule 24(3)(e) was "*the grounds on which the respondent relies, including any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal"*.

<u>Second consultation</u>

10. Modernisation of the tax appeals system was a separate strand within the overarching TCEA implementation.

11. The TPC consulted for 12 weeks from August to November 2008 on draft rules for the F-tT(Tax) and on how the UT rules (as had been made during the currency of the consultation) should be amended to make these appropriate for the appellate jurisdiction for tax, it having been decided that it was not necessary to have separate rules for each UT Chamber.

12. In particular, on 19 August 2008 the further draft of the UT Rules was issued and consulted on.

13. There were 21 responses to the consultation, of which 14 responses also commented on the (further) draft UT Rules. None set out any points arising from draft rule 24 (as none were raised).

14. The rules were laid before Parliament on 15 February 2009, and came into effect on 1 April 2009. In particular, the Tribunal Procedure (Amendment No. 1) Rules 2009 made no relevant change to the wording of UT rule 24 as had been consulted on.

15. By the Tribunal Procedure (Amendment No. 2) Rules 2009, the wording of UT rule 24(3)(e) became '*the grounds on which the respondent intends to rely, including (in the case of an appeal against the decision of another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal*'. The Explanatory Note stated that the change was one of many to make provision for the UT to deal with new types of case from 1 September 2009. It reflected the creation of the F-tT(GRC), with appeals from that Chamber going to the UT(AAC) save for 'charities' cases which went to the UT(TCC). That remains the current wording.

16. The TPC's Reply (June 2009) in respect of the 2 consultations stated the following:

"25. The Committee has adopted an open style in the Tribunal Procedure Rules to allow tribunals as much flexibility as possible. The consequence is that former rules that were more prescriptive have not been reproduced. Nonetheless, the tribunal will often be able to adopt the same procedures within the new rules and will be able to issue directions (including standard directions) for that purpose. Several issues raised in the responses were, in our view, matters of detail that could more appropriately be dealt with through such directions, or through Practice Directions issued by the Senior President of Tribunals or Chambers Presidents under section 23 of the Tribunals, Courts and Enforcement Act 2007, than through rules."

Third consultation

17. Between July and September 2009, the TPC ran a consultation on rule amendments for the UT Rules due to the need to accommodate appeals to the UT (IAC) from the F-tT (IAC). The consultation pack contained the consultation questions; and the draft UT Rules amendments (with a consolidated version). Included for information and completeness was the draft Asylum and Immigration Tribunal (Procedure) and (Fast track Procedure) Rules 2005 for the F-tT(IAC) (with consolidated versions); and draft Practice Directions and Statements. Stakeholder events to support the consultation took place in Manchester, Glasgow and London at the beginning of August 2009, and were attended by a total of 84 stakeholders. 10 responses to the consultation were subsequently received. The consultation closed on 29 September 2009.

18. No proposal had been made by the TPC for change to UT rule 24, but Question 1 asked: "*Are the general powers and provisions sufficient for the immigration and asylum appeals?"* The majority of respondents agreed that the general powers as set out in the consultation document were sufficient for the immigration and asylum jurisdiction of the F-tT and UT.