Tribunal Procedure Committee

Consultation on possible changes to rule 22 of the Upper Tribunal Rules 2008

Introduction

1. The Tribunal Procedure Committee (the "TPC") is the body that makes Rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. Both are independent tribunals, and the First-tier Tribunal is the first instance tribunal for most jurisdictions. Further information on Tribunals can be found on the HMCTS website at: 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-tT(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 "UT(AAC)"), the Upper Tribunal (Immigration and Asylum Chamber), or the Upper Tribunal (Tax and Chancery Chamber) (the "UT(TCC)").

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), with all matters dealt with under the Upper Tribunal (Lands Chamber) Rules. This Consultation is not concerned with possible amendment of the Upper Tribunal (Lands Chamber) Rules, but only with possible changes to the UT Rules.

This Consultation – UT rule 22

11. The purpose of this Consultation is to seek views as to possible changes to UT rule 22. That rule deals with decisions in relation to permission to appeal ("PTA"), and specifically as regards an application for 'reconsideration' at a hearing if PTA is, on the papers, refused or is limited or conditional.

12. Rights to appeal from the F-tT to the UT, and only with PTA, are provided for by section 11 of the TCEA (set out below, insofar as material, and with emphasis added):

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 <u>on any point of law</u> 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.

13. A party who is dissatisfied with a decision of another tribunal (such as the F-tT) may seek PTA from the F-tT in accordance with the F-tT Rules which apply to proceedings in the particular F-tT Chamber. If that application for PTA is refused, then the party must seek PTA from the UT in accordance with UT rule 21, which provides as follows (insofar as material):

Application to the Upper Tribunal for permission to appeal
21.—

(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 or has been granted only on limited grounds.
(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;
(aa) in an asylum case or an immigration case where the appellant is in the United Kingdom at the time that the application is made, 14 days after the date

on which notice of the First-tier Tribunal's refusal of permission 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.

14. UT rule 22 states as follows (with emphasis added):

Decision in relation to permission to appeal
22.—

(1) Except where rule 22A (special procedure for providing notice of a refusal of permission to appeal in an asylum case) applies, if the Upper Tribunal refuses permission to appeal or refuses to admit a late application for permission, it must send written notice of the refusal and of the reasons for the refusal to the appellant.
(2) If the Upper Tribunal gives permission to appeal—

(a) the Upper Tribunal must send written notice of the permission, and of the reasons for any limitations or conditions on such permission, to each party;
(b) subject to any direction by the Upper Tribunal, the application for permission to appeal stands as the notice of appeal and the Upper Tribunal must send to each respondent a copy of the application for permission to appeal and any documents provided with it by the appellant; and
(c) the Upper Tribunal may, with the consent of the appellant and each respondent, determine the appeal without obtaining any further response.

(3) Paragraph (4) applies where the Upper Tribunal, without a hearing, determines an application for permission to appeal—

(a) against a decision of—
(i) the Tax Chamber of the First-tier Tribunal;
(ii) the Health, Education and Social Care Chamber of the First-tier Tribunal;
(iia) the General Regulatory Chamber of the First-tier Tribunal;
(iii) the Mental Health Review Tribunal for Wales; or
(iv) the Special Educational Needs Tribunal for Wales; or
(b) under section 4 of the Safeguarding Vulnerable Groups Act 2006.

(4) In the circumstances set out at paragraph (3) the appellant may apply for the decision to be reconsidered at a hearing if the Upper Tribunal—

(a) refuses permission to appeal or refuses to admit a late application for permission; or
(b) gives permission to appeal on limited grounds or subject to conditions.

(5) An application under paragraph (4) must be made in writing and received by the Upper Tribunal within 14 days after the date on which the Upper Tribunal sent written notice of its decision regarding the application to the appellant.

15. Thus, the 'oral renewal provision' represented by UT rule 22(4) applies to all prospective appeals from the F-tT(Tax), F-tT(HESCC) and F-tT(GRC), and the Mental Health Review and Special Educational Needs Tribunals in Wales, along with Disclosure and Barring Service safeguarding cases. Prospective appeals from the F-tT(Tax) are dealt with by the UT(TCC); all others listed are dealt with by the UT(AAC). In particular, the provision applies to what may be termed 'new jurisdiction' cases, in which prior to the creation of the UT the route of appeal for a prospective appellant was to the High Court.

16. It is also helpful to understand the type of applications for PTA which do not have the benefit of this 'oral renewal provision'. The UT(AAC) is also responsible for dealing with appeals against decisions made by certain Chambers of the F-tT, and certain decisions made by others, including:
    - social security and child support (appeals from F-tT(SEC))
    - war pensions and armed forces compensation (appeals from F-tT(WPAFCC))
    - Pensions Appeal Tribunal in Northern Ireland (only for assessment appeals under the War Pensions Scheme) (appeals from that Tribunal)

17. Although UT rule 22(4) states that the applicant "*may apply*" for a renewal hearing, the practice (both in the UT(AAC) and UT(TCC)) has been to treat this as a *right* to have an oral renewal hearing. However, this 'right' does not preclude an application being struck out without holding a hearing, e.g. as having no reasonable prospects of success under UT rule 8(3)(c).

18. The TPC is considering whether a power should be conferred on a UT judge refusing PTA on the papers to certify the application in question as being "totally without merit" ("TWM"). The consequence of such certification would be that the applicant would not be allowed to renew the application at an oral hearing.

19. There are several reasons why such a change might now be considered appropriate, and these are set out below.

20. The first reason would be coherence. Had these 'new jurisdiction' cases remained in the High Court, rather than being transferred to the tribunal system under the TCEA, then they would now be subject to being found to be TWM. The CPR provide that, for appeals to courts other than the Court of Appeal, where a judge has refused PTA on the papers and considers the claim to be TWM, then there is no right to an oral renewal hearing (CPR 52.4(3)). CPR 23.12 further provides that *"if the court dismisses an application (including an application for permission to appeal or for permission to apply for judicial review) and it considers that the application is totally without merit – (a) the court's order must record that fact; and (b) the court must at the same time consider whether it is appropriate to make a civil restraint order*." It may be thought difficult to see why applicants in these new jurisdictions should be 'better off' than those who have remained in the court system.

21. The second reason would be consistency with judicial review processes. Where a judge has refused permission in a judicial review application on the papers, and considers the claim to be TWM, then the claimant has no right to an oral renewal hearing (see CPR 54.12(7) and UT rule 30.) Amending UT rule 22 so as to introduce a TWM power would bring the provisions governing applications and appeals in Part 3 of the UT Rules in line with those applying to judicial review applications in Part 4 of the UT Rules. The UT already has extensive experience (especially in the UT(IAC)) of applying the TWM provision in the context of judicial review proceedings. There is ample guidance from the superior courts on the distinction between those applications for PTA which are "not arguable" and those which are TWM – see e.g. *R (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1191 and *Wasif and another v Secretary of State for the Home Department* [2016] EWCA Civ 82.

22. The third reason would be equality of treatment. Social security appellants (in the F-tT(SEC)) form the great majority of applicants to the UT(AAC) for PTA. This group of appellants has never enjoyed this 'right' to an oral renewal of a refused PTA, although as individuals they may be far more vulnerable, and may be challenging decisions that have a far more drastic impact on their daily lives, than some of those in the 'new jurisdictions'.

23. The fourth reason would be efficiency. The main argument against a TWM proposal may be that it is unnecessary, and cases which are genuinely TWM can be adequately catered for under the relevant UT Chamber's existing case management powers. However, if a judge goes straight to an oral hearing, anticipating that a renewal application would be inevitable in the event of a refusal on the papers, then the Chamber is devoting a scarce resource to a case which – were it, e.g., a Social Entitlement application – would have been dealt with expeditiously on paper in accordance with the overriding objective. In the alternative, a judge may issue a 'strike out warning', but that necessarily entails the use of further judicial, administrative and clerical time on what is often a hopeless case. The route of striking out such a hopeless PTA application is not an efficient way of bringing the proceedings to a full stop, as it can only be done if the applicant is given the opportunity to make representations.

Cart Judicial Review

24. Currently, an unsuccessful applicant for PTA following an oral renewal hearing may seek permission to apply for judicial review in the Administrative Court (a "Cart JR"). As decided in the case of *R (on the application of Cart) v The Upper Tribunal* [2011] UKSC 28, decisions of the UT concerning PTA are amenable to judicial review on the basis of an error of law. Under a TWM regime, unsuccessful applicants whose cases had been found to be TWM would still have the opportunity to make an application for permission to apply for judicial review.

25. The Government issued a consultation paper (duration 18 March to 29 April 2021) entitled 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law'. A link to the consultation paper is as follows. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf

26. The Government consultation paper followed the conclusion in the report of the Independent Review of Administrative Law (published March 2021) that Cart JRs were an area of judicial review that could usefully be cut back. The Government agrees, and intends to remove the avenue of lodging Cart JRs, effectively reversing the outcome of the *Cart* case. A Government response to its consultation paper will be published in due course.

27. The TPC has no role to play as regards removal of the ability to make an application for Cart JR, as it is beyond the remit of the TPC. It is a matter of substantive law, which would be achieved by primary legislation. This Consultation is concerned solely with TWM.

The (UT) Lands Chamber consultation

28. When the Lands Registration appellate jurisdiction passed from the UT(AAC) to the UT (Lands Chamber), the TPC consulted (in the summer of 2017) as to any changes to the UT(LC) Rules which may be required. One issue concerned whether the PTA regime in the UT (Lands Chamber) - no automatic right for oral renewal - was appropriate for these cases.

29. Some relevant passages from that consultation are now set out (adjusted as appropriate, as regards TWM). They may have similar application to this Consultation.

"The TPC sees nothing remarkable in a PTA regime such as that in the UT(LC) [i. e. no automatic right for oral renewal]*. With any appellate system involving application for PTA, a prospective appellant must be given a fair opportunity to show that they should be allowed to move up within the Tribunal system to try to displace a considered, independent and impartial judgment already rendered in the case. That fair opportunity is to seek to persuade the appellate Tribunal, acting by a single judge, that such party should have access to a full appeal and to be granted a fair allocation of the resources of the Tribunal in seeking to displace the existing judgment. Any regime of reconsideration at an oral hearing is based, as a matter of practice, on the opportunity it may present for one judge to take a different view to another (who has refused PTA on paper). But the TPC considers that there is no intrinsic right, arising from the need for fairness, for a prospective appellant to have "two bites at the cherry".*

Judicial views are bound to vary regarding the merits of cases, including in application of the arguability [or TWM] *threshold on an application for PTA. The object of an appeals system cannot be wholly to eliminate the risk that some cases do not proceed to a full appeal at which it might transpire that the appellant would be successful: that would be inconsistent with having a PTA requirement in the first place.*

If a judge considers a PTA application and appreciates that their decision is final [in certifying TWM]*, without there being further recourse to the view of another judge, it may be expected that even greater diligence would then be applied.*

The UT already has power, under UT Rules, rule 5(3)(f), to direct an oral hearing of an application for PTA if it considers it appropriate to do so. This may be a useful option in cases where facts are obscure, where a proposed ground of appeal has been poorly presented or is otherwise difficult to grasp. It may be particularly helpful if a prospective appellant is without legal representation. A UT judge reviewing the documents should be well placed to make, and well capable of making, an assessment in light of the particular circumstances of the application whether it is one which ought to be the subject of a directed oral hearing or not [or whether it is TWM]."

30. Although one respondent to that consultation objected to removal of the automatic right to reconsideration of an application for PTA, that was not the view of the other respondents. The TPC concluded that the PTA regime in the UT (Lands Chamber) - no automatic right for oral renewal - was appropriate for these cases.

31. The TPC considers that the passages set out above are apposite as regards the possibility for change to the UT Rules to create a TWM certification power. In particular, that there is no intrinsic right, arising from the need for fairness, for a prospective appellant to have "two bites at the cherry" underlies what was stated by the Court of Appeal in the *Wasif* case:

    "*The point of a renewal hearing is not that the claimant is entitled to another dip into the bran-tub of Administrative Court or Upper Tribunal judges in the hope of finding someone more sympathetic*."

The potential value of an oral hearing, and decision-making as to TWM

32. As was further stated in the *Wasif* case, the potential value of an oral renewal hearing does not lie only in the power of oral advocacy. It is also an opportunity for the applicant to address the perceived weaknesses in the application which have led the judge to refuse PTA on the papers (and which should have been identified in the reasons for refusal). The points in question may not always have been anticipated or addressed in the grounds.

33. Further, the practice in the UT(TCC) is that it is the judge who refused PTA on the papers who also considers an oral renewal application (as is also the case in the Chancery Division of the High Court). The rationale for this approach is that it is the most efficient use of judicial time: the applicant still benefits, because judges are perfectly able to, and often do, change their mind with the benefit of the fuller argument that an oral hearing allows.

34. Whether or not current UT practice would be for an oral renewal hearing to be dealt with by the same judge who refused PTA on the papers or by a different judge, if a TWM regime comes into place the judge considering the papers should only certify the application as TWM if satisfied that in the circumstances of the particular case a hearing could not serve the purpose described in the *Wasif* case; and the applicant should get the benefit of any real doubt. As further stated in the *Wasif* case, no judge will certify an application as TWM unless they are confident after careful consideration that the case truly is bound to fail; he or she will no doubt have in mind the seriousness of the issue, and the consequences of his/her decision in the particular case.

35. If the Government follows through with its intention to remove Cart JRs, there will be no further recourse for an unsuccessful applicant for PTA. If a regime of TWM is created, unsuccessful applicants whose cases had been found to be TWM will reach the 'end of the road' at the stage of their application being found to be TWM, rather than (without a TWM regime) following an oral renewal hearing.

36. Some cases are "*bound to fail*", "*hopeless*", or with "*no rational basis*" (words which the Court of Appeal in the *Wasif* case hoped were helpful in describing cases which were TWM, whilst recognising that they were necessarily imprecise). It might be thought that such cases ought to reach the 'end of the road' as soon as it is fair and just for them to do so, by careful consideration of a UT judge following the approach outlined in the *Wasif* case.

Indicative drafting of a TWM provision

37. An application for PTA may have different outcomes, depending on its grounds. It is possible, for example, that PTA may be granted on some grounds, refused on other grounds, and some grounds may be considered TWM.

38. To cater for these possibilities, an amended version of UT rule 22 (by indicative drafting, as relevant) would be as follows:

….

(4) ***Subject to paragraph (4A),*** *in the circumstances set out at paragraph (3) the appellant may apply for the decision to be reconsidered at a hearing if the Upper Tribunal—*

(a) refuses permission to appeal or refuses to admit a late application for permission; or

(b) gives permission to appeal on limited grounds or subject to conditions.

(4A) Where the Upper Tribunal considers the whole or a part of an application to be totally without merit, it shall record that fact in its decision notice and, in those circumstances, the person seeking permission may not request the decision or part of the decision (as the case may be) to be reconsidered at a hearing.

Question 1

Do you consider that there should be a power conferred on a UT Judge deciding PTA (or an application to admit a late application for PTA) on the papers to certify the application (or part of it) as being "totally without merit", with the consequence that the applicant would not be allowed to renew the application (or that part of it) at an oral hearing? If so, why; and if not, why not?

Question 2

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

Question 3

Do you have any further comments?

How to Respond

Please reply using the response questionnaire template.

The consultation will close on **16 August 2021**

As the TPC Secretariat are currently working remotely, please send your response by Email to: 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