Tribunal Rules

Implementing part 1 of the Tribunals, Courts and Enforcement Act 2007

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

(May to July 2021)

Reply from the Tribunal Procedure Committee

November 2021

Introduction

1. The Tribunal Procedure Committee ("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.

2. 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.

3. 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.

4. 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

5. 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)").

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

7. 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) (the "UT(IAC)"), or the Upper Tribunal (Tax and Chancery Chamber) (the "UT(TCC)").

8. 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

The Consultation Process

9. A consultation (the "Consultation") ran over the period May to July 2021, its purpose being 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. Before turning to the terms of UT rule 24, we outline some background to the appeals procedure.

10. Rights to appeal from the F-tT to the UT, but 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.

11. A party who is dissatisfied with a decision of another tribunal (such as the F-tT) may be given PTA. 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. 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.

UT rule 24

12. In material part, the terms of UT rule 24 are as follows (with emphasis added, as relevant to the 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 *Devani* and *SSE* cases

13. The Consultation had been prompted by 2 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.

14. Both cases were reviewed in detail in the Consultation. The Consultation also set out the terms of CPR 52.13, in comparison to those of UT rule 24. 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.

15. 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.

High level choices outlined

16. The Consultation sought to draw some strands together in terms of what steps were open to the TPC (by way of possible amendment of rules) in light of those cases. Various options were outlined, as 'high level choices'. These were not all possible options as to ways forward, but it was hoped that they would provide sufficient context for responses to the Consultation to be informative.

17. It was also stated in the Consultation that 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. Such 'business' and experience/considerations across the UT Chambers was described in the Consultation.

18. Broad options for the TPC were identified in the Consultation as follows.

    (i) To reverse 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.

Options in detail as reviewed in the Consultation

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

19. The purpose of reversing the *Devani* interpretation would be to maintain flexibility for the UT, across all Chambers.

20. It might be thought to make sense for the UT/appellant to know in good time 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.

21. Indicative drafting (directed to reversing the *Devani* interpretation) was 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.

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

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

23. Indicative drafting (directed only to making the *Devani* interpretation express) was 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) <u>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.</u>
(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.

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

24. 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 of the Consultation, and the *Eynsham Cricket Club* case in paragraph 128 of the Consultation), in conjunction with the mandatory obligation anticipated by Option 2.

25. Indicative drafting was 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.

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

26. There were 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.

27. 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.

28. Discussion in the Consultation (see its paragraphs 21 to 23, 111 to 115, 122 to 124) suggested concerns as to the underlying basis of the decision in the *SSE* case and as to its consequences. It is possible that the consequences could be 'worked round', but it

might also be possible to adjust the terms of UT rule 24 so as to avoid potential difficulties, specifically as to issues of PTA.

29. 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.

30. The practical result sought to be achieved would be as follows. If a respondent wished to raise again points on which it had 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 wished 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 could consider not only whether the 'arguability' threshold was crossed but also whether it was right to allow the new point to be argued, applying the appropriate principles. In that regard, the UT would seek representations from the appellant.

31. Indicative drafting was 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.

32. By reference to the above 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 was 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).

33. If that drafting approach was considered correct, there remained 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.

34. It was considered that this might 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 was 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.

35. The suggestion was 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).

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

36. The Consultation stated that it might be thought difficult to advocate for mandatory UT rule 24 responses in all appeals. If there were 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 a response 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.

37. If, however, a UT rule 24 response was to become mandatory, indicative drafting was 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.

38. It was also stated that 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 to uphold the decision for reasons other than those given by the tribunal;

Responses to the Consultation, and Conclusions

39. There were 3 responses to the Consultation – see Annex A. One respondent provided comments in summary form, rather than dealing specifically with answers to the Questions posed. That was helpful, but in what follows the TPC has made assumptions as to this respondent's position on the Questions.

40. The Questions raised are listed below, with the responses then set out, followed by the conclusions of the TPC (in light of the responses).

Question 1: Do you consider that the *Devani* interpretation should be 'overruled' by rule change? If so, why; and if not, why not?

41. The *Devani* interpretation (see paragraph 13 above) is that if a respondent wishes to rely on grounds on which it had been unsuccessful in the F-tT, then it is under an obligation to provide a UT rule 24 response. 'Overruling' the *Devani* interpretation was Option 1.

42. One respondent answered ‘No’ to Question 1, stating that it would be undesirable positively to discourage respondents from giving notice of any grounds they wish to advance.

43. Another respondent drew a distinction between a respondent wishing to rely on points that required PTA and those which did not. It was stated that it should remain a requirement to seek PTA in time against any point of law arising from a decision made by the F-tT which would make a material difference to the outcome (as per paragraph 113 of the Consultation). However, UT rule 24 responses should be a requirement of the Rules in all cases where the respondent to any appeal to the UT wishes to rely on any points on which PTA is not required (because of the ‘materiality principle’ – see paragraphs 112 and 113 of the Consultation) but which amount to ‘*reasons other than those given by the [First-tier Tribunal]*’ (see the indicative drafting under Option 3 – paragraph 25 above).

44. It was stated that requiring a response in certain circumstances (i) focuses the minds of the parties; (ii) maximises procedural fairness (in that parties are not at risk of being ambushed with new arguments); and (iii) minimises waste of the UT’s resources (by reducing the risk of adjournments and encouraging concessions and agreement).

45. Further, leaving it for directions to be made in individual cases risks inconsistency between different cases and in any event directions are routinely ignored or treated flexibly by parties in immigration appeals, in particular the Secretary of State for the Home Department, with little attempt at enforcement by the UT. Putting a requirement into the Rules gives additional force to the requirement and improves consistency of treatment.

46. As such, this respondent is taken as answering ‘No’ to Question 1.

47. A further respondent stated that as a starting point, it would not be appropriate to comment on whether the *Devani* interpretation should be ‘overruled’. However, it was considered notable that the *Devani* case arose out of a ‘rather peculiar set of procedural circumstances’. The problem would not have arisen had either the slip rule been correctly used and/or the appeal hearing not been listed by the UT until after the time for an UT rule 24 response to be provided. Against that background, and taking into account all of the issues identified within the Consultation, there did not appear to this respondent

to be either any particularly pressing need or a practical benefit in making the provision of an UT rule 24 response mandatory in circumstances envisaged in UT rule 24(3)(e).

48. It was considered significant that the issue of the UT and the appellant being made aware of the respondent's position could be achieved by issuing standard directions (see the Consultation at paragraphs 109, 117, 118 and 130).

49. It was said that one clear advantage of not mandating the provision of the UT rule 24 response is that a flexible approach could then be maintained. Such an approach would be consonant with the overriding objective contained in UT rule 2 that the UT deal with cases fairly and justly, as defined in UT rule 2(2). Fulfilling this objective and maintaining a flexible approach was particularly important given the broad and diverse nature of the jurisdiction with which the UT has to deal (see paragraphs 102 and 103 of the Consultation).

50. For these reasons, this respondent considered that there would be a benefit in clarifying the rules to make clear that a UT rule 24 response is not mandatory.

Conclusion

51. The answer to Question 1 is inevitably linked with Question 2 (see below). If the *Devani* interpretation is to be 'overruled' there must be clear wording to that effect. Leaving things as they are is not considered to be appropriate. Parties should not have to rely on case law in order to understand what requirements there may be for a UT rule 24 response. Further, although directions may be given, the 'starting point' for any litigant will be the UT Rules themselves.

52. It is difficult not to see force in the point that a change to UT rule 24 along the lines of the indicative drafting (Question 2) might well disincentivise a respondent from providing a relevant UT rule 24 response, when to do so would assist the UT/appellant.

53. A flexible approach is not denied if the *Devani* interpretation applies. It will be open for the UT to exercise its discretion to allow a late rule 24 response; indeed to waive the requirement if it considers this just.

54. The TPC is satisfied that there are insufficient reasons to justify departing from the *Devani* interpretation; and as such that (as will appear below) the question arising is how to make that express in the Rules.

Question 2: If so, do you have any comments on the indicative drafting?

55. One respondent considered the question not applicable. Another respondent noted that the indicative drafting only dealt with the particular *Devani* situation, in which a respondent seeks to rely on grounds on which the respondent was unsuccessful in the proceedings which were the subject of the appeal. As such, this drafting left open the question of whether a UT rule 24 response may be mandatory in other circumstances.

Conclusion

56. The point made was noted. Given the conclusion reached in relation to Question 1, the indicative drafting intended to 'overrule' the *Devani* interpretation is not considered further.

Question 3: Should the *Devani* interpretation be made express in the Rules? If so, why; and if not, why not?

57. Making the *Devani* interpretation express in the Rules was Option 2.

58. One respondent stated 'Yes', but stated their preference for Option 4 (see paragraphs 26 to 30 above). Were it not for the need to make provision for respondents to apply for PTA (see below), this respondent would be inclined to suggest leaving the rule as it is in the interests of simplicity. However, given that it is necessary to introduce an element of complication anyway, it was thought desirable to make the legal position clear on the face of the rule and, indeed, to widen the proposed paragraph (1B) to conform more closely with CPR r.13.2 which more clearly describes those cases where a response is particularly desirable.

59. Another respondent's comments (see paragraph 43 above) were taken as supportive of making the *Devani* interpretation express, but refined as in '*reasons other than those given by the [First-tier Tribunal]*'.

60. A further respondent stated that for the reasons set out in its answer to Question 1 (paragraphs 47 to 50 above), there were advantages in not making a UT rule 24 response mandatory. These outweighed any advantage to be gained by doing so.

61. As such, this respondent was taken as not wishing to see the *Devani* interpretation made express in the rule.

Conclusion

62. The TPC considers it desirable, in all the circumstances, to make the *Devani* interpretation express in the Rules. That said, it recognises the point that such

interpretation does not cater for all circumstances in which a UT rule 24 response ought to be mandatory. The TPC also considers that conforming more closely with CPR 15.13(2) would more clearly describe those cases where a response is particularly desirable.

Question 4: If so, do you have any comments on the indicative drafting?

63. One respondent referred to their comments under Question 8 (see below, at paragraphs 82 to 85).

64. Another respondent may be taken as in favour of a formulation that specifies '*reasons other than those given by the [First-tier Tribunal]*'. A further respondent said that the question did not arise.

Conclusion

65. Given the conclusions earlier reached, rather than here setting out its conclusion on the indicative drafting, the TPC moves on to subsequent Questions. It will become apparent that issues of drafting are subsumed in subsequent Questions, responses, and conclusions.

Question 5: Should the terms of UT rule 24 be widened so as to conform more closely with CPR 15.13(2)? If so, why; and if not, why not?

66. Widening the terms of UT rule 24 so as to conform more closely with CPR 15.13(2) was Option 3.

67. One respondent answered 'Yes' to Question 5, but expressed a preference for Option 4 (see their answer to Question 3 (see paragraph 58 above)).

68. Another respondent may be taken as supporting conformity with CPR 15.13(2). Wording the requirement to refer to '*reasons other than those given by the [First-tier Tribunal]*' (as per the CPR), rather than grounds on which the respondent was unsuccessful, was considered by this respondent to be better, because it standardises the approach across different areas of law and avoids the difficulty mentioned in the Consultation where the F-tT simply fails, for whatever reason, to deal with an issue.

69. A further respondent noted (correctly) that Question 5 was predicated on Question 3 being answered in the affirmative, in that Option 3 proposes further adjustment to UT rule 24 to be made in conjunction with Option 2.

70. This respondent stated that for the reasons it had set out in response to Questions 3 and 1 (see paragraphs 47 to 50, and 60 above), the advantages in preserving the position, whereby a UT rule 24 response is not mandatory, outweighed any advantage to be gained by reversing this position. Further, from the perspective of the Scottish jurisdiction, where the CPR have no application, there was no particular attraction in the UT Rules seeking to mirror the CPR.

Conclusion

71. The TPC sees the benefits of wording which conforms more closely with the terms of CPR 15.13(2), in the sense that such wording would be more apt to set out the circumstances in which a UT rule 24 response should be provided. In so doing, the TPC does not intend as a matter of policy to 'mirror' the CPR in general; only to recognise the relevant circumstances for the purposes of UT rule 24.

Question 6: If so, do you have any comments on the indicative drafting?

72. Two respondents considered that the question did not arise. One respondent referred to the answer given to Question 8 (see paragraphs 82 to 85 below).

73. A further respondent may be taken to endorse the indicative drafting, given its earlier comments (see paragraph 68 above).

Question 7: Should the terms of UT rule 24 be widened so as to conform more closely with CPR 15.13(2) and to accommodate applications for permission to appeal? If so, why; and if not, why not?

74. Widening the terms of UT rule 24 so as to conform more closely with CPR 15.13(2) and to accommodate applications for PTA was Option 4.

75. One respondent answered 'Yes' to Question 7. Agreement was stated with the analysis in the Consultation of the *SSE* case and, in particular, with the view that the Court of Appeal had overlooked the power to waive the requirement to apply to the F-tT for PTA before making an application to the UT, '*due to leading counsel for the taxpayer wrongly conceding*' that the UT had had no power to consider whether to give PTA.

76. This respondent also agreed that making an application for PTA to the F-tT was not a jurisdictional requirement and stated that it is unhelpful to impose on respondents a requirement to make such an application. However, the Court of Appeal had clearly ruled that obtaining PTA is a jurisdictional requirement where a respondent needs it, and so it is necessary for the Rules to make provision for respondents to apply to the UT for

PTA. That being so, it was desirable that there be a duty on respondents to give notice of grounds for which they might require permission. A rule conforming with CPR 15.13(2) was likely to achieve that. Breaches of the rule can be waived where it is fair to do so, but the question of permission needs to be addressed by the UT, whether or not the respondent has given notice of the grounds in a response, unless the rules can legitimately provide otherwise.

77. This respondent further referred to their answer to Question 8 (see paragraphs 82 to 85 below).

78. Another respondent may be taken as answering (albeit indirectly) 'Yes' to Question 7. As stated above (paragraph 43), it should remain a requirement to seek PTA in time against any point of law arising from a decision made by the F-tT which would make a material difference to the outcome (as per paragraph 113 of the Consultation).

79. A further respondent noted that as with the *Devani* case, it would not be appropriate to comment on whether the *SSE* case was or was not correctly decided.

80. On the proposed amendment to UT rule 24, it was stated that Option 4 addresses two separate issues: first, the altering of UT rule 24 so as to make the provision of a response mandatory in certain circumstances; and, secondly, to address the need for permission (including PTA) being obtained from the UT in circumstances in which it has not first been sought from the F-tT.

    - The first issue raised by Option 4 is the same as that raised by Option 3 and, accordingly, Question 5. Reference was made to the answers given there (see paragraphs 69 and 70 above).

    - On the second issue, in the circumstances envisaged there was a clear practical benefit of enabling a respondent to apply for PTA from the UT in a UT rule 24 response without having first having to apply to the F-tT (see paras 112 to 115 and 122 to 125 of the Consultation).

    - There is no necessity in linking the resolution of the second issue with the first, as is proposed in Option 4.

<u>Conclusion</u>

81. The TPC is satisfied that it is appropriate to include application for PTA within UT rule 24. It is desirable that there be a duty on respondents to give notice of grounds for which they might require permission. A rule more closely conforming with CPR 15.13(2) was

likely to achieve that. Breaches of the rule can be waived where it is fair to do so, but the question of permission would still need to be addressed by the UT.

Question 8: If so, do you have any comments on the indicative drafting?

82. One respondent considered it to be entirely unrealistic to expect most litigants in person – and, indeed, most non-lawyer representatives (including those employed by Government Departments) – to know when a respondent might need PTA. Even lawyers do not always get it right and, in their experience, most litigants in person do not realise that there might be a distinction between simply responding to an appeal and bringing a cross-appeal and it is not a distinction that is easily explained.

83. This respondent stated that it also seems unnecessary for the UT to have to address its mind to the (sometimes difficult) question whether permission is required by a respondent, if it is prepared to rule on the issue anyway. On the other hand, it would be helpful to have an express provision under which the UT may refuse to allow a respondent to advance what is in effect a cross-appeal that is either misconceived or for which proper notice has not been given.

84. It seemed to this respondent not to be inconsistent with section 11(3) of the TCEA to deem permission to have been given in some cases, and doing so would prevent unmeritorious cases being brought on jurisdictional grounds. The focus should be on whether the proceedings in the UT were fair, as they were in the *SSE* case. Accordingly, this respondent suggested omitting the proposed paragraphs (1C) and (3)(f) of rule 24 and instead introducing a new rule 25A, along the following lines:

"*Respondent's application for permission to appeal*

25A.–(1) Where a respondent requires permission to appeal in order to advance any ground for opposing an appeal (whether the ground is identified in a response made under rule 24 or otherwise), the respondent shall be treated as having applied to the Upper Tribunal for permission to appeal.

(2) Where an application has been treated as made under paragraph (1), permission to appeal shall be treated as having been given on the application unless, before the appeal has been determined –
(a) another party objects to permission to appeal being given; or
(b) the Upper Tribunal otherwise directs."

85. Consequently, the proposed rule 21(1A) would need to be along the following lines:

"(1A) This rule does not apply where a respondent requires permission to appeal in order to advance a ground for opposing an appeal, in which circumstances rule 25A makes alternative and further provision."

86. A further respondent considered that this question does not arise.

Conclusion

87. The TPC recognises that it is sometimes not easy to determine whether PTA is required, and not easy for litigants to decide whether PTA should be sought. But that is an inherent problem, unrelated to any changes to the UT Rules.

88. The 'deeming' proposal made by one respondent is a departure, in principle as well as in drafting. If it is right that a UT rule 24 response be required to specify reasons relied on to oppose the appeal (see above), then this reflects some 'forward thinking' required at that stage by the respondent. These reasons may be 'old points' or 'new points'. But if the latter, it does not seem unreasonable to expect a respondent to consider whether PTA is required and should be sought.

89. This respondent's proposal however places the onus on the appellant to object to a PTA (treated as having been given) at some time prior to determination of the appeal. It is not difficult to see that a LiP appellant could be disadvantaged in a case in which PTA ought not to have been treated as applied for and given. Likewise, parties would not know where they stand until late on in preparation for an appeal hearing.

90. It also appears to the TPC that under this proposal, the notion of a 'cross appeal', in material part, will have fallen away, to be replaced by something of a 'free-for-all' until the UT stops it. There would be no need to apply to the F-tT or to the UT for PTA; the issue could remain in abeyance until any time prior to determination of the appeal. The TPC considers that this should be avoided (or at least not adopted in the absence of further consultation).

91. In any event, it might be considered that section 11(3) of the TCEA, on a straightforward reading, explicitly requires both an application to have been made for PTA and for PTA to have been granted before an appeal can proceed to the UT. This may suggest that the Tribunal (F-tT or UT) is required to have turned its mind to the matter of whether PTA should be granted or not. 'Deemed' PTA might be considered to be a clear step away from this. For UT Rules (which are concerned only with practice and procedure) to be used as a vehicle to introduce 'deemed' PTA, potentially avoiding the requirements of section 11(3) entirely, might not be an appropriate step for the TPC to take.

92. Further, there may be impracticalities concerning the proposal made, whilst recognising the difficulty for litigants, lawyers and judges in determining when PTA is required in many cases. A respondent might raise in its UT rule 24 response a challenge to the F-tT's findings of fact, for which PTA would be needed. A LiP appellant may well not be equipped to raise the 'objection' envisaged by the proposed UT rule 25A(2)(a), so it would be for the UT to identify the issue, which could only be achieved (at least in the UT(TCC)) if the UT were to pro-actively monitor all UT rule 24 responses it receives.

93. If the issue was not identified, the LiP appellant would be put to the time and effort of meeting a factual challenge, even though it should never have been advanced. If, late in the day, the issue is identified, the respondent might doubtless contend that there was so much 'water under the bridge' that the point might as well be allowed to proceed. If the point is not allowed to proceed, time and costs will have been wasted and the respondent might ask for an adjournment, contending that time is needed to refocus its case around the remaining points that survive.

94. As such, there is benefit in retaining the discipline of applying for permission to argue points that need PTA. If a respondent fails to apply for PTA (when it is required), then it has a problem, just as it does if it breaches any other aspects of the Rules. But it would always be open to the UT to waive the breach and decide to grant PTA following a late application if the point emerges later.

Question 9: Should a UT rule 24 response be mandatory in all cases? If so, why; if not why not?

95. Making a UT rule 24 response mandatory in all cases was Option 5.

96. One respondent stated 'No' in answer to Question 9: it would be more trouble than it is worth. The UT routinely directs responses in appropriate cases, but sometimes the UT(AAC) simply informs the parties that it will allow an appeal on an identified ground if no objection is made.

97. Another respondent stated that for the reasons articulated in respect of Question 1 (see paragraphs 47 to 50 above), the advantages in preserving the position, whereby a UT rule 24 response is not mandatory, outweigh any advantage to be gained by altering this position.

Conclusion

98. The TPC is satisfied that there is no sufficient case made out for making a UT rule 24 response mandatory in all cases.

Question 10: If so, do you have any comments on the indicative drafting?

99. Two respondents considered that the question did not arise.

Question 11: Do you have any further comments?

100. No respondent had any further comments.

General

101. No additional comments were received by reference to the subject matter of the Consultation, beyond those set out above.

Overall Conclusion

102. The TPC considers that Option 4 is the appropriate option to govern the way forward. It also considers that the indicative drafting as set out in the Consultation will best achieve the objectives of Option 4.

103. The TPC has had due regard to the public sector equality duty in reaching all its conclusions as set out above.

Keeping the Rules under review

104. The TPC wishes to thank those who contributed to the Consultation process. The TPC has benefited from the responses.

105. The remit of the TPC is to keep rules under review.

Contact details

Please send any suggestions for further amendments to Rules to:

TPC Secretariat
Area 10.21
102 Petty France
London SW1H 9AJ

Email: **tpcsecretariat@justice.gsi.gov.uk**

Further copies of this Reply can be obtained from the Secretariat. The Consultation paper, this Reply and the Rules are available on the Secretariat's website:

http://www.justice.gov.uk/about/moj/advisory-groups/tribunal-procedure-committee.htm

Annex A – List of respondents to Consultation

1. Mark Rowland, retired UT(AAC) Judge, still sitting as Deputy Judge, and a former member of the TPC

2. Immigration Law Practitioners' Association

3. Lord President of the Court of Session