Tribunal Rules

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

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

Reply from the Tribunal Procedure Committee

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 June to August 2021, its purpose being 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.

10. 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.

11. 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 respective 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.

12. 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.

13. 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 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.

14. The Consultation highlighted 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)

15. As was stated in the Consultation, 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).

Consultation proposal: power to certify as 'totally without merit'

16. The Consultation concerned 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.

17. The Consultation set out several reasons why such a change might now be considered appropriate, and these are repeated (for convenience) below, since some respondents commented upon these reasons.

First reason - coherence

18. 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.

Second reason - consistency with judicial review processes

19. 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.

Third reason - equality of treatment

20. 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’.

Fourth reason - efficiency

21. 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

22. As stated in the Consultation, 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.

23. 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', following 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. The Government response to its consultation paper has now been published, and the Judicial Review and Courts Bill is now before Parliament. Clause 2 of that Bill seeks to implement the proposed abolition of the Cart jurisdiction in most cases.

24. 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. The Consultation was concerned solely with TWM.

25. The Consultation had noted that when the Lands Registration appellate jurisdiction passed from the UT(AAC) to the UT (Lands Chamber), the TPC had 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.

26. Some relevant passages from that consultation were set out (adjusted as appropriate, as regards TWM) in the Consultation, as follows. (These remain of significance as regards Conclusions to be reached.)

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].

27. As set out in the Consultation, the TPC had considered that the passages set out above were 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" underlay 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*."

28. The Consultation also noted that as had been 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.

29. 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.

30. 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.

31. As stated in the Consultation, if Parliament enacts legislation 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.

32. The Consultation noted that 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 is helpful not to lose sight of these expressions. 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

33. The Consultation set out (by indicative drafting, as relevant) an amended version of UT rule 22 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.

Responses to the Consultation, and Conclusions

34. There were 4 responses to the Consultation – see Annex A. One respondent stated that they had been described by the UT as an "*experienced*" applicant in the Freedom of Information jurisdiction. The remit of the TPC is limited; in many respects the response of this respondent raised issues that were outside such remit. However, insofar as such issues bore on the subject matter of the Consultation, they are reflected in what follows.

35. 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 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?

36. One respondent agreed that there should be such a power. As a former F-tT Information Rights judge, this respondent commented simply that when F-tT judges refuse PTAs enunciating this ground, then to "*give the appellant another go is perverse*".

37. Another respondent stated: "*No. Unless the first application for PTA is for a full hearing.*"

38. A further respondent (the 'further respondent') was not persuaded that the case had been made for making change at this time. A series of points were made about Cart JR. This respondent was primarily concerned with the use, value and effects of JR. Its primary reason for responding to the Consultation was because of the identified connection with the Government's proposal to abolish Cart JRs. Attention was drawn to the (now published) Government consultation response, as well as to the Judicial Review and Courts Bill. It was said to be of concern that the Consultation was proceeding at a time when it was unclear whether and to what extent the Cart jurisdiction will remain. This respondent was opposed to the Government's proposal to abolish Cart JRs (with summary reasons being given).

39. A final respondent (the 'final respondent') stated that important cases would not have been heard without the Cart jurisdiction. One example suggested was *LO'L v Secretary of State for Work and Pensions (ESA) (Tribunal procedure and practice (including UT): fair hearing)* [2016] UKUT 10 (AAC), [2016] AACR 31, which concerned the right to obtain "reasonable adjustments" under the common law duty of fairness. It was "*not public knowledge*" as to how many other cases changed the law that had to be taken through the Cart jurisdiction, but it was suggested there are "*important matters that are likely to be overlooked*" under the current system (and especially upon a removal of the existing Cart 'supervision').

40. In addition to its points about Cart JR, the further respondent made points as to the reasons offered in the Consultation (see paragraphs 18 to 21 above) for the proposal to

amend UT rule 22. These points are set out below, along with those made by the final respondent in the same context.

Coherence

41. For the reasons the further respondent had explained in its submissions to the Government's JR consultation, and in its submission in response to the Government's consultation on appeals from the UT (to which the Government's Response was still awaited), there was said to be an important distinction between the High Court and the UT. Judges of the High Court are part of the ordinary court system; there is a "*greater risk of ossification of the law*" in the Tribunal system if it is more insulated from the ordinary court system. Subject to the availability of Cart JR, the refusal of PTA to the UT prevents appeals from ever reaching the ordinary court system. There is therefore a good reason for the distinction between the way that applications for PTA are treated in the Tribunal system as compared to the High Court.

42. The final respondent suggested that a presumption had been made that a review by a High Court judge and that by a UT judge were equivalent. But the "*average judicial quality*" of a High Court judge compared to that of a UT judge was "*very different*". Further, administrative tribunals, including the UT, are "*well known to have a lower standard of judicial independence*" than a High Court judge. Further, a High Court judge is not a specialist in the area of law, thus having a more independent vantage point (e.g. they are less likely to be supportive of practices and conventions that evolve over time in a specialist jurisdiction). What may appear to a specialist judge as TWM could actually be a valid case; there are cases where a UT judge has certified an application as being TWM, yet the substantive appeal is eventually upheld.

Consistency with judicial review processes

43. The further respondent stated that there is again an important distinction. If permission to apply for JR is incorrectly refused by the UT (or by the Administrative Court), the applicant is able to seek PTA from the Court of Appeal. For the reasons this respondent had explained in its submission to the Government's consultation on appeals from the UT, this is a "*vitally important mechanism*" to prevent the Tribunal system from becoming "*overly parochial and insulated from external scrutiny*". There is therefore a good justification for the distinction between PTA and JR.

Equality of treatment

44. The further respondent stated that there is no apparent reason for the different treatment of social security appellants, who may be thought more likely to require an oral hearing to ensure fairness given their vulnerability and the significance of what is at stake for them. This does not however in itself justify taking away the important right to seek an oral hearing (in other cases). It would also be open to the TPC to "*level up*" by giving social security appellants the right to oral renewal of a PTA application.

45. The final respondent stated that it had been assumed that the practice in respect of social security applicants (i. e. no right to oral renewal) was fair. Yet "*just because something has always been done does not necessarily make it right*". It was said by the final respondent that if the TPC believes the practice is correct (for social security applicants), then it would be "*easy enough to do an empirical study*", for instance giving 100 randomly selected applications to two independent judges to see if they always reached the same decision. That way, the reliability of the PTA process on the papers could be determined.

46. As for in person (or other) hearings, the final respondent stated that it is "*well known*" that at first-instance, in person hearings are associated with a far greater success rate. It was assumed that it would be a 'reasonable adjustment' in line with the common law principle of fairness to provide this to a litigant with a disability who asked for one. The existing practice of not having hearings dates from a time when hearings were generally in person, where tribunals administratively operated entirely on paper documents (rather than electronic equivalents), and thus there was a considerable expense in routinely holding hearings.

47. To routinely give an applicant the right to a telephone or virtual hearing would not be particularly burdensome. It would be a simple matter of setting up a calendar and having litigants book in for their determinations, if this is the format they wish to use to present their case to the UT. The only real resource this would entail is a UT Judge having to trouble to listen to the claimant and what they have to say.

48. As such, the final respondent contended that the social security jurisdiction <u>should</u> hold hearings (for PTA) on a request from an applicant, in common with the other jurisdictions of the UT. The case set out in the Consultation was thus

"*tantamount to claiming that two wrongs make a right. This is simply not so*."

Efficiency

49. The further respondent stated that the Consultation had presented no evidence to support the case for reform. No data had been provided about the number of cases in which an oral renewal is sought, or the number or type of cases in which PTA is granted on oral renewal. Nor is any information given about how much judicial time is spent considering applications on oral renewal. Without this data it was impossible to assess whether the additional time and resources involved are warranted by the importance of what is at stake and the interests of fairness.

Generally

50. For the reasons it had given, the further respondent was not persuaded that the case has been made for removing the right of oral renewal. They were concerned that, coupled with the proposals to restrict the availability of Cart JR, there is a real risk of injustice and an increased risk of the development of a 'local law' within the Tribunal system.

51. The final respondent too opposed the proposed changes for a number of reasons. This respondent was that described by the UT as an "*experienced*" applicant in the Freedom of Information ("FoI") jurisdiction (meaning appeals concerning s.50 of the Freedom of Information Act 2000, including onward appeals to the UT). This respondent stated that the FoI jurisdiction "*does not operate effectively or fairly*", and that the F-tT(GRC) has been "*inadequately supervised for an extended period of time*". The proposal would make the situation "*even worse*". It was said that many of the propositions in the Consultation were "misconceived or poorly evidenced" (see the comments made under 'Coherence' and 'Equality of Treatment' above).

52. Reference was also made by the final respondent to what had been specifically stated in the Consultation paper as to the approach to be taken in certifying a case as TWM (see paragraph 30 above). This respondent offered "*counter examples*" in the FoI jurisdiction. Further, in a jurisdiction that has already

implemented TWM, there were examples of UT Judges "*misusing that power (or at the least, acting carelessly)*". For example, the current President of the UT(IAC), when a UT Judge, had refused permission to apply for JR and then certified the case as being TWM. However, the Court of Appeal reversed that decision, before then going on to grant permission and upholding the JR, in effect on the basis of *Wednesbury* unreasonableness.

53. This final respondent considered the FoI jurisdiction, at both F-tT and UT levels, to be "*dysfunctional and ineffective*". Criticisms were made of judicial acumen, decision-making and "*behaviour*" (in particular in cases where this respondent had been a party), the operation of "*internal tribunal politics*", and the appointment of a large number of purportedly independent members in the F-tT(GRC) who are directly regulated by the Respondent in such cases (the Information Commissioner), rather than being qualified for the post in question.

54. It was also said that the F-tT is "*widely known for its lack of judicial independence*", and that the same can be said for the UT. This respondent offered some examples of UT Judges "*acting inappropriately on appeals*", which – it was said - suggested that it is "*highly likely the TWM jurisdiction will be abused*". This respondent did not know of an information requester who believed the system was fair. It is "*not a jurisdiction that has the respect of those who appear before it*".

55. This final respondent stated that there were other flaws with the proposal in question, at least as it applies to the FoI jurisdiction. Some examples were given.
    a. The FoI jurisdiction is "*political in character*": unlike any other jurisdiction of the UT, it routinely takes decisions that ultimately have political consequences. The TWM proposal to make one Judge a "*unilateral gatekeeper*" on all FoI appeals (which is what an unchallengeable TWM jurisdiction would be) is inappropriate on this basis. Although that Judge is able to select the second Judge (another problem with the existing system), this does from time-to-time offer some protection from that judge's lack of judgement and tendency to be biased against LiPs who appear in the FoI jurisdiction.
    b. As well as the examples this respondent had offered, there is also a tendency for some judges of the UT to change the cases being advanced by parties, in order to shape the law in a different way. This is also most

troubling and is another problem with the current system. More scrutiny, not less, is needed to address this problem.

c. In a FoI appeal, an applicant is often unable to assess the merits of their own case: where there is a merit assessment by the Tribunal, it is often done based on evidence that the applicant cannot see. So in some cases, all they can do is say "I seek permission to appeal, because I do not think the Tribunal reached the right result". How this would work in the context of the TWM jurisdiction is wholly unclear. Given the "*denigration*" inherent in a TWM determination, this is likely to have a "*chilling effect*" on appeals to the UT. See for example *Karl Ammann v Information Commissioner*: [2020] UKUT 344 (AAC) as an example of the difficulties faced by requestors in a substantive appeal to the UT.

d. Presuming that the Cart jurisdiction is removed as expected, then appeals against these TWM decisions will go straight to the European Court of Human Rights. It is difficult to see how this is desirable.

56. Accordingly, the final respondent suggested that the proposal was inappropriate for the FoI jurisdiction. The TPC should be looking at how to improve the fairness of this jurisdiction, rather than making the situation worse. For example, it might be that High Court Judges be allocated to hear FoI appeals, including at the PTA stage, as opposed to using regular UT Judges. Similarly, any selection of UT Judges should be done using a provably random process, rather than being allocated by the lead Judge of that jurisdiction. The proposed modifications for UT rule 22 are inappropriate. There is a reconsideration required, but in the direction of more, not less scrutiny of the F-tT. Indeed, the proposed changes would seem unlikely to survive a judicial review application, provided that would be fairly determined.

<u>Conclusion</u>

57. The consideration of the TPC takes account of the proposed abolition of the Cart JR jurisdiction. It is satisfied that the case had been made for making change at this time. In particular, the matters raised under the headings 'Coherence' and 'Consistency with judicial review processes' are further reviewed below.

Coherence

58. The TPC does not accept that there is a materially important distinction between the High Court and the UT in the relevant context. Nor is it accepted that there is a "*greater risk of ossification of the law*" in the Tribunal system if it is "*more insulated*" from the ordinary court system. The Government's Response to the Judicial Review Reform Consultation was published in July 2021.The Government's response to the Consultation Reforms to arrangements for obtaining permission to the Court of Appeal has not yet been published. The TPC is, however, satisfied that there is no sound reason for the distinction between the way that applications for PTA are treated in the Tribunal system as compared to the High Court.

59. Nor does the TPC accept that the "*average judicial quality*" of a High Court judge compared to that of a UT judge is "*very different*", or that administrative tribunals, including the UT, are "*well known to have a lower standard of judicial independence*" than a High Court judge. A High Court judge may not be a specialist in the area of law, but a specialist UT judge will be well placed to determine whether a case is TWM. Although in theory what may appear to a specialist (or any) judge as TWM could actually be a valid case, the TPC saw no reason to doubt that if the principles set out in the *Wasif* case were applied, the prospects of such a case being wrongly identified as TWM would be slim. See paragraph 32 above: these would be cases within the descriptions the Court of Appeal hoped were helpful.

Consistency with judicial review processes

60. The TPC does not accept that there is an "*important distinction*" in play. If permission to apply for JR is incorrectly refused by the UT (or by the Administrative Court), the applicant is able to seek PTA from the Court of Appeal. It was not considered that the Tribunal system would be becoming "*overly parochial and insulated from external scrutiny*". Nor was it considered that there was a sound justification for the distinction between PTA and JR.

Equality of treatment

61. As to the different treatment of social security appellants, and suggested scope for *'levelling up*' by giving social security appellants a right to oral renewal of an application for PTA, that was not the subject matter of the Consultation. Prior to the UT Rules first being made, they were the subject of consultation. Based on the consultation responses, it was considered appropriate for there to be no right of oral renewal in these cases (none had earlier existed, and none was argued for). The TPC is not

aware of any widespread support for a right of oral renewal of a PTA application for these cases.

62. The TPC does not undertake any *"empirical studies*", but it may in certain circumstances seek relevant evidence. However, the issue with which the Consultation was concerned is not about 2 judges coming to different conclusions in social security cases; rather, it is TWM certification in non social security cases.

63. It is accepted that some cases would not have been heard (in the High Court) without the Cart jurisdiction. The case of *LO'L v Secretary of State for Work and Pensions (ESA) (Tribunal procedure and practice (including UT): fair hearing)* [2016] UKUT 10 (AAC), [2016] AACR 31, involved a Cart JR, but when it was subsequently argued in the UT, the appeal was lost; the claimant had been dealt with fairly in the F-tT.

64. As to the point raised about success rates of in person (or other) hearings at first instance, the Consultation was concerned with cases which are properly to be considered 'hopeless' as regards a successful appeal to the UT. The TPC does not accept that oral hearings (even virtual, and with electronic documents) in such cases are without material consequences for resources. Whatever medium is used for an oral hearing has consequences for other cases, delaying making time available for those cases. Hearing an application in a case which is properly determined as TWM is a detriment to a case which <u>does</u> have merit.

Efficiency

65. The point was noted that the Consultation had presented no data about the number of cases in which an oral renewal is sought, or the number or type of cases in which PTA is granted on oral renewal. It was also noted that the Consultation offered no information about how much judicial time is spent considering applications on oral renewal. It was not accepted that it was thus "impossible" to assess whether the additional time and resources involved are warranted by the importance of what is at stake and the interests of fairness. The TPC approaches these matters on a pragmatic basis. Its starting point is that cases which are judicially assessed as hopeless ought not to be remaining within the Tribunal system to the detriment of other cases. All cases are individual to the issues they raise. The key is not about numbers, or types, of cases, nor on the amount of judicial time spent on any particular case, or type of case. Rather, once a case has been judicially assessed as TWM it ought to be considered fair that no further judicial or administrative time is spent on such a case.

66. It was not considered that this would lead to an unacceptable risk of injustice; nor to an increased risk of the development of a 'local law' within the Tribunal system.

67. Matters of 'judicial independence' are not within the remit of the TPC. It is not accepted that it is highly likely (or likely) that a TWM jurisdiction would be 'abused'. The *Wasif* case (as referenced in the Consultation) is considered to provide clarity for judicial decision-making as to certification of TWM.

The FOI jurisdiction in particular

68. The TPC noted the comments that the FoI jurisdiction, at both F-tT and UT levels "*does not operate effectively or fairly*", was "*dysfunctional and ineffective*", and that the F-tT(GRC) has been *"inadequately supervised for an extended period of time*" and that the proposal would make the situation "*even worse*". . It is "*not a jurisdiction that has the respect of those who appear before it*". The TPC is concerned with Rules. The Rules must comply with the statutory objectives. It is for the judiciary and the parties to have regard to those Rules. The Consultation was concerned solely with the issue of TWM.

69. Criticisms were made of judicial acumen, decision-making and "*behaviour*", the operation of "*internal tribunal politics*", and the appointment process for members in the F-tT(GRC). The remit of the TPC does not include the operation or staffing of the F-tT(GRC). Nor are the details of individual cases within the remit of the TPC save where the operation of Rules is in question. The TPC also noted the "*counter examples*" offered in the FoI jurisdiction. It did not appear to the TPC that these examples concerned TWM.

70. As to specific points made by the final respondent:
    a. It is accepted that in the FoI jurisdiction decisions may be made in cases which have 'political' content. The TWM proposal is not however to make one Judge a "*unilateral gatekeeper*" on all FoI appeals. The proposal is solely to provide for an opportunity to certify TWM. It is not within the remit of the TPC as to whether a single judge will consider, on paper, all applications for PTA. Whoever will look at applications for PTA on the papers will no doubt have the principles described in the *Wasif* case in

mind. Questions of "*lack of judgement and tendency to be biased against LiPs who appear in the FoI jurisdiction*" are not within the remit of the TPC.

b. As for a "*problem*" being "*a tendency for some judges of the UT to change the cases being advanced by parties, in order to shape the law in a different way*". This 'problem' (if it is a problem) is not a matter within the remit of the TPC.

c. It is correct that in some FoI appeals, there may be 'closed' evidence that the applicant cannot see, following a direction given under Rule 14.6 of the Rules which apply in the F-tT(GRC). Revealing such closed evidence would defeat the purpose of non-disclosure. Nonetheless, an applicant to the UT for PTA must identify an error of law. It is not enough to say "*I do not think the Tribunal reached the right result*". It is not accepted that a TWM determination would be likely to have a "*chilling effect*" on appeals to the UT. With the existing right of oral renewal of an application for PTA, the applicant is in no better position. An oral hearing does not 'tease out' information that the applicant has not seen.

d. If the Cart JR jurisdiction is removed, it does not follow that appeals against such TWM decisions will go "straight to the European Court of Human Rights". It may be considered that the two-tier tribunal system is itself sufficient to resolve any claims related to Human Rights. The cases of *R. (on application of Siddiqui) v Lord Chancellor [2019] EWCA Civ 1040* and *R. (on the application of Soni) v Lord Chancellor [2021] EWHC 3137 (Admin)* challenged changes to the CPR which established that applications to the Court of Appeal for PTA would be determined on the papers without an oral hearing except where a judge directs otherwise. Both challenges raised whether the amendments were in violation of Article 6 rights; both were dismissed. It may be supposed that similar grounds might be put forward to challenge the proposed TWM regime.

71. Whether High Court Judges should be allocated to hear FoI appeals, including at the PTA stage, or whether any selection of UT Judges should be done using a "provably random process" are not matters within the remit of the TPC.

72. As to the point made that, in a jurisdiction that has already implemented TWM, there are examples of UT Judges "*misusing that power (or at the least, acting carelessly)*", this was a reference to the *Naidu* case. In that case, the UT, exercising its JR jurisdiction, had refused permission to JR, and refused PTA

with a certification of TWM. An appeal was made to the Court of Appeal against refusal of permission to JR and against the refusal of PTA. The appeal succeeded: permission was given to JR, and the JR then succeeded. Although the consequence of the TWM certification had been that there was no right to an oral renewal (in the UT) of the PTA application, there had still been the right to seek PTA from the CA in respect of the refusal of permission to JR. The applicant had not been deprived of the opportunity to pursue JR – they just had to go to the Court of Appeal. The Court of Appeal did not find that the decision had been a result of a misuse of power or of carelessness. Nor was the same argued by the applicant. Reference is made to the passages set out in paragraph 26 above. There will always be cases like this. But parties do not have unfettered rights to appeal forever, onward and upward.

73. Overall, in light of all the above, the TPC is satisfied that the case had been made for making change to UT rule 22 to accommodate possible certification of an application for PTA as TWM. In reaching that conclusion, the TPC considers that the power so to certify would unlikely be used unless with circumspection and only when considered clearly necessary and appropriate.

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

74. One comment was received on the indicative drafting. "*It may be that one of the factors that could be considered by the UT Judge in determining this matter is whether the FTT Judge has highlighted and reasoned through the "totally without merit" refusal in that Judge's decision to refuse PTA*".

Conclusion

75. It would not be a requirement for the F-tT to consider whether an application for PTA is TWM. It would however always be open for the F-tT to reach such a conclusion, and express it. That would not prevent the applicant nonetheless seeking PTA from the UT. The TPC considers that it is for the UT judge considering whether to certify an application as TWM to proceed as they see fit.

Question 3: Do you have any further comments?

76. One respondent asked '*What is the test for totally without merit?*'. No other comments were received.

Conclusion

77. The TPC refers to the *Wasif* case for the test.

Overall Conclusion

78. The TPC considers that it is appropriate to provide for TWM certification, and in accordance with the indicative drafting set out in the Consultation.

79. 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

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

81. 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
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. Edward Williams
2. Robin Callender Smith of ARBITA
3. Public Law Project
4. Dr Reuben Kirkham