Tribunal Procedure Committee

Consultation reply on possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022

(Consultation period: 27 October 2022 to 19 January 2023)

Reply from the Tribunal Procedure Committee
April 2023

Introduction

1. The Tribunal Procedure Committee (the "TPC") is the body that makes rules that govern practice and procedure in the First-tier Tribunal and in the Upper Tribunal. Both are independent tribunals. The First-tier Tribunal is the first instance tribunal for most jurisdictions, while the Upper Tribunal is primarily responsible for appeals.

2. The TPC is established under s22 of, and Schedule 5 to, the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), with the function of making Tribunal Procedure Rules for the First-tier Tribunal and the Upper Tribunal.

3. Under s22(4) of the TCEA, power to make Tribunal Procedure Rules is to be exercised with a view to securing that:
    a) in proceedings before the First–tier Tribunal and Upper Tribunal, justice is done;
    b) the tribunal system is accessible and fair;
    c) proceedings before the First–tier Tribunal or Upper Tribunal are handled quickly and efficiently;
    d) the rules are both simple and simply expressed; and
    e) the rules where appropriate confer on members of the First–tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

4. In pursuing these aims the TPC seeks, among other things, to:
    a) make the rules as simple and streamlined as possible;
    b) avoid unnecessarily technical language;
    c) enable tribunals to continue to operate tried and tested procedures which have been shown to work well; and
    d) adopt common rules across tribunals wherever possible.

5. The TPC also has due regard to the public sector equality duty contained in s149 of the Equality Act 2010 when making rules.

6. Further information on the TPC can be found at our website: https://www.gov.uk/government/organisations/tribunal-procedure-committee

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

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

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

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

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

The Consultation Process

10. A consultation (the "Consultation") ran over a period from 27th October 2022 to 19th January 2023. Its purpose was to seek views on possible changes to the IAC Rules and the Upper Tribunal Rules arising from the Nationality and Borders Act 2022 (the 'NBA').

11. A copy of the Consultation is available at: https://www.gov.uk/government/consultations/possible-changes-to-the-first-tier-tribunal-immigration-and-asylum-chamber-rules-and-the-upper-tribunal-rules-arising-from-nationality-and-borders-a

12. There were 15 responses to the Consultation. A list of those who responded can be found at Annex A.

13. The questions raised are listed below, with the responses then set out, followed by the conclusions of the TPC in light of the responses.

14. In early March 2023, shortly before the Illegal Migration Bill had its first reading in parliament, the Ministry of Justice informed the TPC that the government did not intend, at least in the short term, to bring the relevant provisions of the NBA into force.

15. Since the rules that the TPC was preparing to make arose out of the requirements of the NBA the TPC concluded that it would be inappropriate to proceed with the rules.

16. The TPC has been told that the provisions in the NBA may be brought into force at a future date. If this occurs, the TPC will consider what implications this has for the IAC Rules and Upper Tribunal Rules. The TPC will also consider what, if any, further consultation is required at that stage.

17. Although the TPC does not now intend to make the rules it has consulted on, it has concluded that it is appropriate and important that it should publish this consultation reply. The rules making process had reached a very late stage, with rules about to be made. It is valuable to have a public record of the TPC's conclusions and reasoning for the rules that it would have made. The TPC is also conscious that the respondents to the consultation will have invested significant time and effort in contributing to the process. It is right that they receive a reply from the TPC setting out the conclusions that it has arrived at in light of their responses to the consultation.

18. To assist readers of this reply in understanding its decisions the TPC will also publish keeling schedules of the IAC Rules and Upper Tribunal Rules indicating the changes it intended to make. These reflect the TPC's intentions immediately prior to its March 2023 meeting, at which it intended to finalise the rules and this reply. That meeting might have led to minor drafting changes in the rules, but the TPC did not anticipate making substantial changes to its decisions at that point.

Questions 1 to 5 – Expedited Appeals and Related Appeals: Upper Tribunal Rules

Question 1: Do you agree that rules relating to expedited and related appeals should be contained in a separate schedule? If not, why not?

19. The respondents who addressed this question either agreed that the rules relating to expedited and related appeals should be contained in a separate schedule or took a neutral position. The TPC therefore intended to proceed with the approach of a separate schedule, for the reasons set out in the Consultation.

20. One respondent noted a concern that it should be clear that the main Upper Tribunal Rules would continue to apply in Priority Removal Notice cases in areas where they were not superseded by the new Schedule. The TPC considered whether it would be appropriate to make this explicit in the Rules, but concluded that it was unnecessary. The existing Schedules to the Upper Tribunal Rules operate satisfactorily without an explicit rule. Introducing such an explicit rule in only one schedule might create ambiguity or confusion in relation to the others.

Question 2: What approach should the Tribunal Procedure Committee take to drafting rules for expedited and related appeals? Should the Tribunal Procedure Committee seek to replicate the current approach in the First-tier Tribunal Immigration and Asylum Chamber or apply a more traditional appeal structure? If so, why?

21. Eight respondents to the Consultation addressed this question. Seven supported replicating the current approach in the First-tier Tribunal (IAC) over a more traditional appeal structure. They noted the benefits of a consistent approach between the First-tier and Upper Tribunal. In addition to meaning that parties and representatives were more likely to be familiar with the process, a consistency of approach would facilitate the transfer of cases between the two Tribunals. Respondents also referred to the benefits of the current approach in the First-tier. A number of respondents also suggested that putting in place a short and straightforward mechanism for starting an appeal would make it easier for appellants to complete it within the timescale, especially given that they were likely to be detained.

22. One respondent argued that, in circumstances where most appellants would be detained and likely to have trouble accessing legal support, a more traditional process was likely to be easier for them to navigate, particularly within an expedited timescale.

23. On balance the TPC concluded that replicating the current approach in the First-tier Tribunal would have been the best solution. In reaching this conclusion the TPC noted the overall consensus among respondents addressing this question, but also reached the view that the somewhat different approach to expedition in these appeals (discussed below) would ameliorate some of the concerns raised.

24. One respondent to the Consultation suggested that there should be a preliminary hearing or a paper review to establish that the certification of a right of appeal under s82A of the Nationality, Immigration and Asylum Act 2002 has been correctly made and that the expedited procedure was appropriate. The TPC considered this suggestion, but concluded that it would not be an appropriate rule to make. Any dispute in relation to the issuing of the certification would be a jurisdictional matter that could be raised in the normal way, either by a party or the Tribunal on its own initiative.

Question 3: Do you agree with the timeframes suggested by the Tribunal Procedure Committee? If not, what alternative timeframe would you suggest and why?

25. A number of respondents expressed concerns with the suggested approach to the requirement for expedition established by the NBA. A number noted that the requirement laid out in s82A of the Nationality, Immigration and Asylum Act 2002 was of a general nature and (in contrast to the provisions related to detained appeals) did not specify a particular time period. It also did not require the case management deadlines in the rules to be shortened (which was the mechanism used to seek expedition in the proposed rules).

26. Further, a number of respondents argued that the proposed expedited timeframe laid out in the suggested rules would not have the desired effect. First, because the steps involved accounted for a relatively small part of the overall time taken to resolve an appeal. This meant that, even where deadlines were complied with, the impact on the time taken to determine the appeal would be small. Second, because the expedited timeframe would present significant difficulties for parties – both appellants and the Home Office – particularly in a context where appellants would often be detained. This, it was suggested, would mean that the proposed rules would not achieve the aim of appeals being brought and determined more quickly.

27. One respondent queried whether the apparent comparative nature of the duty imposed by the new s82A(4) required the Upper Tribunal to adopt dynamic case management and listing policies, by reference to the average time taken by the First-tier Tribunal to dispose of appeals, from time to time. On this approach, it would be necessary for the Upper Tribunal to truncate the listing and case management of expedited appeals to ensure that, however long the equivalent proceedings were taking before the First-tier Tribunal, they would be dealt with more quickly before the Upper Tribunal.

28. Having considered these responses concerning the proposed timeframes, the TPC concluded that it should not attempt to prescribe a specific timeframe for expedited appeals in the Upper Tribunal. There was a real risk that, under the proposed rules, cases would not generally be brought and determined more quickly. Even if they were, the impact would probably be relatively small. The point is aptly illustrated by one response to the Consultation which contended that what the TPC needed to do to comply with the s82A(4) duty would be to reduce the time limit for lodging a notice of appeal by a single day. Parliament cannot have intended expedited appeals to be characterised by a mere 24 hours' expedition, for such changes would lead to negligible overall improvements.

29. The TPC also concluded that Parliament cannot have intended for either the TPC, the Rules or the Upper Tribunal to be required to engage in regular statistical or technical comparisons with the listing and case management practices of the First-tier Tribunal. Such an approach would encounter considerable practical hurdles, for it would require the prevailing listing and case management practices of the Upper Tribunal to be determined by reference to the performance, during any given period, of the First-tier Tribunal. This approach could also lead to absurd results. For example, if the First-tier Tribunal began to encounter significant delays in appeals being "brought and determined", the Upper Tribunal could legitimately introduce corresponding, albeit slightly shorter, delays into the determination of expedited appeals, while acting consistently with any comparative duty imposed by the rules. That cannot have been the intention of Parliament.

30. The TPC therefore considered other mechanisms in the rules to achieve the expedition sought by s82A. This included consideration of some form of 'long stop', requiring that expedited appeals be determined within a particular deadline. The TPC rejected this approach as both wrong in principle and fraught with practical problems. Since, inevitably, some cases would take longer than average to resolve because of their

particular nature or circumstances, any long stop would need to be placed later than an average appeal would take to resolve. This would severely limit its practical effect.

31. A 'long stop' approach would also raise the important question of what action would be taken if a case breached, or appeared likely to breach, that requirement. If there was no effective step, the efficacy of the rule would be much reduced. But it was difficult to see what effective step could be taken that would not be counterproductive. It would not be helpful, where a case had already been delayed, to seek to transfer it to the First-tier Tribunal, since that would only cause more delay.

32. The TPC therefore re-examined s23 of the Act in light of the concerns raised by respondents to the Consultation. It noted that, in contrast to the duties imposed upon it in relation to accelerated detained appeals by s27(3), Parliament has chosen not to mandate the adoption of specific case management timetables or deadlines in relation to expedited appeals. Similarly, the duty imposed by the new s82A(4) is expressed in more general terms, requiring the rules to make provision "with a view to securing", rather than mandating that particular, specified outcomes must be secured. The term "normal course of events" before the First-tier Tribunal must be a reference to the overall approach usually adopted by that tribunal in circumstances where there is no broader statutory or policy imperative to determine cases more quickly. The TPC considers that s82A(4) is a requirement to make rules that will lead to a general expedition of these cases in a practical sense, not a requirement to engage in bald statistical comparisons between the case management performance of the First-tier Tribunal from time to time and that of the Upper Tribunal.

33. The TPC also considered that Parliament's use of the term "brought and determined" in s82A(4) provides a further insight into the intention behind the legislation. The act of bringing an appeal is within the gift of an appellant, whereas the responsibility for determining an appeal lies with the tribunal. S82A(4), however, treats the term as a single composite act in relation to the First-tier Tribunal: "would, in the normal course of events, be brought and determined *by the First-tier Tribunal…*" The subsection does not say "brought *before* and determined *by* the First-tier Tribunal", rather it attributes the bringing and determination of an appeal to the First-tier Tribunal. Since the First-tier Tribunal cannot bring an appeal to itself, and given Parliament has chosen not to mandate the adoption of specific timeframes (in contrast to those imposed by s27(3) of the Act), Parliament must have intended this duty to have effect in a high level and aspirational manner.

34. Drawing this analysis together, the TPC concluded that the most appropriate way to give effect to the statutory duty imposed by s82A(4) would have been to make provision in the same high level terms as adopted by the primary legislation. The TPC considered that, even without mandating precise timeframes for expedited appeals, the rules could nevertheless encourage the Upper Tribunal and the parties to proceedings in expedited appeals to deal with the proceedings in an expedited manner. In practice, the Upper Tribunal is accustomed to dealing with certain proceedings more quickly than would otherwise be the case, where there is good reason to do so, consistent with the overriding objective, for example through truncated case management directions,

allocation of resources and listing the appeal more quickly. Adopting an appropriate degree of expedition in such cases is consistent with the overriding objective and does not require express provision to be made in the rules addressing each stage of the proceedings. By the same token, a similar approach could be adopted in expedited appeals.

35. To that end, the TPC had decided to expand the indicative characteristics of the overriding objective contained in rule 2(2) of the UT Rules, to reflect the statutory duty imposed by s82A(4), without attempting to impose a gloss on the meaning of the provision. This would have been achieved by the insertion of a new Rule 2(2)(f), adopting the language of s84A(4):

> **Overriding objective and parties' obligation to co-operate with the Upper Tribunal**
>
> **2.**—(1) The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
> (d) using any special expertise of the Upper Tribunal effectively;
> (e) avoiding delay, so far as compatible with proper consideration of the issues; and
> *(f) in the case of an expedited appeal or an expedited related appeal, bringing and determining an appeal more quickly than an appeal under section 82(1) of the 2002 Act would, in the normal course of events, be brought and determined by the First-tier Tribunal, so far as compatible with proper consideration of the issues.*
>
> (3) The Upper Tribunal must seek to give effect to the overriding objective when it—
> (a) exercises any power under these Rules; or
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
> (a) help the Upper Tribunal to further the overriding objective; and
> (b) co-operate with the Upper Tribunal generally.

36. The TPC considered that adopting this approach avoided the pitfalls, practical difficulties, and potential absurdities identified above. It reflected the practical reality that, in appropriate cases, the Upper Tribunal was already able to adopt a degree of expedition where required, without the precise timeframes for such expedition being defined by rules of procedure.

37. Allied to this approach, the TPC considered that it would have been necessary to replicate the safeguard contained in the existing Rule 2(2)(e) ("avoiding delay, *so far as compatible with proper consideration of the issues*") in relation to the s82A(4) duty, to avoid unfairness arising from undue expedition. In turn, the TPC considered that "proper consideration of the issues" in relation to the timing of an expedited appeal (or avoiding delay in an expedited appeal under Rule 2(2)(e)) could inform the Upper Tribunal's application of paragraph 6 in the new Schedule 5 (transfer of an expedited appeal to the First-tier Tribunal where that is the only way to secure that justice is done).

38. The TPC expected that this approach would have both allowed and required the Upper Tribunal to seek expedition of this class of cases in a much broader sense than could be achieved through the original draft Rules, especially in light of the responses to the Consultation. In particular, it would have required the Upper Tribunal to have regard to expedition of these appeals in the context of its allocation of resources, both administrative and judicial, and in the listing of appeals.

39. If the Rule had been made in this form, the TPC would have expected to keep the Rule and its practical effects under review to ensure that it had the effect sought by s82A. If, in practice, expedited appeals were not determined more quickly than they would be in the First-tier, the TPC would have considered making further rules changes to achieve this end.

<u>Question 4: Do you agree with the proposed Rule 6? If not, why not?</u>

40. Those respondents who answered this question either agreed with the approach in the proposed Rule (subject to the drafting points addressed below) or took a neutral position.

41. Two respondents suggested that the drafting of Rule 6(2) might imply that the Upper Tribunal was not required to consider an application for an appeal to be transferred to the First-tier Tribunal. This was not the TPC's intention and the TPC concluded that it was appropriate to redraft Rule 6(2) to remove references to considering whether to make an order under Rule 6, in order to make this clearer.

42. In addition, the TPC concluded that references to a 'determination' within Rule 6 were potentially unhelpful, since that term has a particular meaning within the context of immigration appeals. Reference to a 'determination' or even to a 'decision' in this context might tend to suggest that a decision under Rule 6 was capable of being appealed to the Upper Tribunal, whereas the TPC's view is that such a decision would be an excluded decision under s11(1) of the Tribunals, Courts and Enforcement Act 2007.

43. For these reasons, the TPC therefore concluded that the following formulation of Rule 6 would have been preferable:

Transfer to First-tier Tribunal

6 (1) Where satisfied it is the only way to secure that justice is done in a particular Expedited Appeal or Expedited Related Appeal, the Upper Tribunal may order that an Expedited Appeal and/or Expedited Related Appeal be continued as an appeal or appeals to the First-tier Tribunal and make any directions it considers appropriate.

(2) The Upper Tribunal may on its own initiative, or upon an application from a party, make an order in accordance with sub-paragraph (1), setting out any appropriate directions.

(3) A copy of the order made under sub-paragraph (1) shall be sent by the Upper Tribunal to the First-tier Tribunal and to the parties to the appeal.

44. One respondent suggested that, in addition to the circumstances described in the proposed Rule 6, the UT should be able to transfer an expedited appeal to the First-tier Tribunal if a) it could not be fairly prepared within the expedited timetable or b) it could not be completed justly in less than 98 days.

45. Whatever the merits of this approach from a policy perspective, the TPC concluded that it was not a possible approach given the provisions of s82A of the Nationality, Immigration and Asylum Act 2002. This set out both the circumstances of the UT's jurisdiction over an expedited appeal and the circumstances in which a transfer could be made to the First-tier Tribunal. These preclude the approach suggested by the respondent.

46. The TPC therefore intended to make the Rule as formulated above.

Question 5: Do you agree with the proposed Rule 7? If not, why not?

47. Those respondents who answered this question either agreed with the approach in the proposed Rule (subject to the points addressed below) or took a neutral position. The TPC therefore intended to proceed with the proposed Rule 7.

48. One respondent suggested that there was a risk that, if the case management timetables within the First-Tier Tribunal and the Upper Tribunal were different, it would mean that the deadlines in an expedited appeal and related appeal would fall on different days. The TPC did not agree that this was an issue that could be avoided by having the same timetable, since an expedited appeal and a related appeal would, in any event, have been commenced on different dates. This would inevitably mean that the deadlines imposed by the Rules would, in practice, arise on different dates. In any event, the TPC's decision to achieve expedition through an amendment to the overriding objective, rather than through a shortened timetable within the Rules, meant that there would no longer have been a difference in the deadlines applied in expedited appeals and related appeals.

49. One respondent suggested that whenever a related appeal was transferred to the Upper Tribunal there should be an automatic case management review. Although the TPC agreed that, in most cases, it would be desirable to carry out such a review, this could be dealt with under the Upper Tribunal's existing case management powers and that an explicit rule to that effect was not necessary.

Question 6 – Expedited Appeals and Related Appeals: IAC Rules

Question 6: Do you agree with the proposed First-tier Tribunal Rules? If not, why not?

50. Six respondents expressed agreement with the proposed First-tier Tribunal Rules. The other respondents did not express a view. The TPC intended to make the proposed rules for the reasons set out in the Consultation.

51. One respondent noted that there was no mechanism in the draft Rules for the First-tier Tribunal to be informed of a related appeal. The TPC agreed that, in practice, it would be necessary for the First-tier Tribunal to be made aware of a related appeal, but concluded that an explicit notification rule was not necessary. The forms used for expedited appeals would have allowed for any related appeal to be disclosed. In addition the Upper Tribunal is able to access the First-tier Tribunal case management systems and will be able to check for a related appeal.

Question 7 – Expedited Appeals and Related Appeals: IAC Rules and Upper Tribunal Rules

Question 7: Do you have any other comments on the suggested rules relating to Priority Removal Notices?

52. Two respondents suggested that if an expedited appeal was, in error, made to the First-tier Tribunal rather than the Upper Tribunal it should be treated as effective and transferred to the Upper Tribunal. This would avoid difficulties with time limits or the Tribunal's jurisdiction.

53. The TPC concluded that this fell outside its rule making powers. The jurisdiction for expedited appeals had been set by the NBA. It was not open to the TPC to make rules allowing such appeals to be lodged in the First-tier Tribunal. In the event that an appeal is initially commenced in the wrong Tribunal, that error (and any explanation for it) may subsequently be relied upon in an application for an extension of time. The Upper Tribunal routinely considers such applications already.

Questions 8 to 17 – Accelerated Detained Appeals: IAC Rules

Question 8: Do you agree that rules relating to accelerated detained appeals should be contained in a separate schedule? If not, why not?

54. The respondents who addressed this question all agreed that the rules relating to accelerated detained appeals should be contained in a separate schedule. The TPC therefore intended to proceed with this approach for the reasons set out in the Consultation.

Question 9: Do you agree that accelerated detained appeals should follow a similar approach to that currently operating in the First-tier Tribunal Immigration and Asylum Chamber, rather than a more traditional sequence? If not, why not?

55. The respondents who addressed this question agreed that accelerated detained appeals should follow a similar approach to that currently operating in the First-tier Tribunal. The TPC therefore intended to proceed with this approach for the reasons set out in the Consultation.

Question 10: Do you agree with the deadlines proposed in the draft Rules? If not, why not?

56. A number of respondents were concerned about the overall timescale set out in the NBA. They argued that, in the circumstances of many appeals involving detained appellants, 25 days was an inadequate time fairly to resolve the appeal. In particular, respondents pointed to difficulties accessing legal advice (especially given the need to obtain legal aid), difficulties communicating with appellants in detention (both because of the characteristics of those appellants, such as mental health challenges and lack of English, and the particular difficulties caused by detention). Respondents also noted that, in many detained appeals, there would be a need for significant preparation, such as obtaining medical evidence, expert evidence or documents from abroad. These steps would often be impossible to complete within 25 days. Many respondents argued that the Home Office was unlikely to be able to meet the deadlines imposed upon it by the draft Rules, suggesting that, in many cases, the longer deadlines currently in place were not being met.

57. All of these matters are considerations that the TPC would have had regard to if the decision as to whether to introduce some form of accelerated process in relation to detained appellants remained with the TPC. As noted in the Consultation, however, the provisions of the NBA require the TPC to make rules providing for the deadline set out in s27 NBA. The overall timescale in accelerated detained appeals is therefore not a matter for the TPC.

58. One respondent commented on the proposed Rule 14, which dealt with the Tribunal's powers to vary timescales for complying with a rule or direction. In particular, they argued that the addition of a requirement that the extension or shortening of time

'would secure that justice would be done' was unhelpful, because it was unclear what this meant or to what extent it required a different approach to the Tribunal's consideration of any similar matter under its ordinary case management powers.

59. The TPC concluded that Rule 14 was unnecessary and could potentially cause confusion. The TPC therefore decided to remove it from the Rules to be made.

60. This would have meant that the Tribunal, in dealing with the variation of timescales in an Accelerated Detained Appeal, would apply its general case management powers contained in Rule 5(3)(a) in the normal way. It would have retained its power to extend or shorten the time for complying with any rule.

61. Given the short time scales involved, shortening of time was unlikely to be practical. In practice, the TPC expected that, in the context of Accelerated Detained Appeals, this power would primarily have been used to grant short extensions of time (perhaps 1 or 2 days) where appropriate. If a longer extension to a rule or direction was required in order to deal appropriately with an appeal, then that would probably have meant that it was not possible for justice to be done in relation to that appeal within the Accelerated Detained Rules, requiring it to be transferred out.

62. One respondent made a number of points in relation to the drafting of these rules. First, they suggested that Rule 4(3)(c) created a potentially excessive burden on appellants because it required them to provide documents in support of their case that had not previously been supplied to the Respondent. A similar obligation was then contained in Rule 9(1)(b) at the stage that a represented party provided their skeleton argument. This, it was suggested, created a piecemeal approach with little benefit.

63. The TPC did not agree. The proposed Rules mirrored those current in the IAC Rules (Rule 19(5) and 24A(1)(b)). It was not desirable to have a divergence of approach between the Principal Rules and those applying to Accelerated Detained Appeals. Further, and in any event, the TPC did not agree that the Rules created a piecemeal approach. In general, most of the documents relied upon in support of an appellant's case will have been provided to the Respondent to an Appeal before the appeal begins. Those documents do not then need to be disclosed again. Where that is not the case, and the appellant wishes to rely upon new documents, it is desirable, if possible, for those new documents to be provided when the appeal is lodged, so that they can be considered before the response to the appeal is made. Where that has been done, there will be no need for those documents to be disclosed again when a skeleton argument is filed. If, at the point that a skeleton is filed, undisclosed documents are relied upon, it is obviously desirable that they be disclosed at that stage. In practice, this is not a piecemeal approach, but a requirement that documents relied upon be disclosed in a timely fashion.

64. Second, they suggested that the requirement in Rule 5 that the First-tier Tribunal provide the Respondent with a copy of the appeal (including accompanying documents), list the appeal and provide both parties with directions on the same day that the notice of appeal was received was impractical. On reflection the TPC agreed. Appeals are often

lodged late in the day and, in such a case, there would not be enough time for the Tribunal to comply with this requirement within the proposed Rule. The TPC concluded that requiring these steps to be taken 'No later than the end of the next working day' was an achievable timescale, while avoiding delay.

65. Finally, the respondent suggested that, in order to deal with matters efficiently within an accelerated process, it was desirable for the Tribunal to be able to give extempore decisions, alongside oral reasons, as well as being able to deal with applications to appeal orally at a hearing. The TPC considered these were potentially valuable ideas, but were also substantial changes to the way that the First-tier Tribunal operates. There were likely to be disadvantages, as well as advantages. They were therefore matters that would need to be consulted upon and the TPC will keep them under review in the future.

<u>Question 11: Do you agree with the approach to removal of an appeal from the accelerated detained rules contained in draft Rule 17? If not, why not?</u>

66. With one exception, the respondents who addressed this question agreed with the approach set out in draft Rule 17.

67. One respondent suggested that it was unnecessary to remove any appeals from the accelerated procedure and that this simply added to the complication of the system that should be simplified. This is not an option open to the TPC, since s23(5) NBA requires the TPC to make rules allowing for the removal of an appeal from the accelerated process where that is necessary to secure that justice was done.

68. In considering the transfer Rule further, the TPC concluded that it was desirable for the Rule more closely to follow the wording in the NBA. S27(5) requires the Tribunal Procedure Rules to provide that the Tribunal *may*, if it is satisfied that it is the only way to secure that justice is done in a particular case, order that the appeal is to cease to be an accelerated detained appeal. The Rule as consulted on instead provided that the Tribunal *must*, in those circumstances, remove the appeal from the accelerated process.

69. The TPC concluded that the practical difference between these approaches was slight. The most important element of the legal test was the Tribunal's assessment of whether the only way to secure that justice is done in a particular case was for it to be transferred out of the accelerated process.

70. Once the Tribunal concluded that a transfer was the only way to secure that justice was done it would be expected to exercise its power to transfer, in accordance with the overriding objective.

71. Nonetheless, the TPC concluded that following the Act's wording closely was desirable for three reasons. First, the Act required that Rules be made in a particular form and specified that this be by providing the First-tier and Upper Tribunal with a power to transfer in certain circumstances. The TPC concluded that the approach set out by the

Act should be followed, even if a different formulation of the Rule would achieve a similar practical result.

72. Second, closely following the Act's requirements would reduce any scope for confusion or uncertainty arising from a difference between the wording of the Rule and the requirements set out in s27(5).

73. Third, the TPC was concerned that a mandatory rule potentially created a risk of inappropriate or premature transfers. In considering whether a transfer is required, the Tribunal will be carrying out a forward-looking exercise, which will inevitably involve a degree of uncertainty. A rule expressed in a mandatory fashion might be taken to imply that, if there was any possibility that justice could not be done in a particular case within the accelerated process, it must be transferred immediately. This might lead to transfers where, for example, relevant evidence was expected to be available in a timely manner, but might not be. This was not, the TPC concluded, appropriate or the intention of s27(5).

Question 12: If you believe there should be any rule in addition to draft Rule 17, what rule would be desirable and why?

74. One respondent suggested that all unrepresented parties should be removed from the Accelerated Detained Rules automatically. The TPC concluded that this was not permitted by the provisions of the NBA.

75. One respondent suggested that it was difficult to anticipate how s27(5) and Rule 17 would operate in practice. They suggested that it was desirable for there to be more detail, in guidance and / or rules regarding the exercise of the general power. Although the TPC considered this, it concluded that any elaboration on the statutory wording was more likely to create further complexity rather than clarifying the approach. Applications under Rule 16 would involve a wide range of circumstances and factors that would need to be considered on their merits. The TPC concluded that a more detailed or prescriptive rule would not assist in that decision-making process.

Question 13: Do you agree with the requirement of a suitability review contained in draft Rule 10? If not, why not?

76. The majority of respondents agreed that a suitability review was appropriate. Only one respondent suggested that it was not necessary. The TPC concluded that a suitability review was an important requirement, for the reasons described in the Consultation.

Question 14: If there is to be a suitability review contained in the rules, when should it take place, and why?

77. One respondent agreed that the suitability review should occur 16 working days after the notice of appeal was received, while also suggesting that some flexibility might be appropriate.

78. Four respondents said that the suitability review should occur earlier than 16 working days after the notice of appeal was received. In particular these respondents argued that it would be clear that a case was unsuitable at an early stage and that a later suitability review would potentially interfere with preparation for the hearing.

79. One respondent argued that the Rule should be flexible, with the timing of any suitability review left to the Tribunal, to allow for adaptation to the particular circumstances of an appeal.

80. The TPC agreed that flexibility in the timing of the suitability review was desirable. It was, however, also desirable for the Rules to establish a default position. This would mean that parties and representatives would be able to anticipate when the suitability review was likely to occur.

81. It would also allow the suitability review to be listed automatically, using the Tribunal's computerised systems. This would mean that, almost immediately upon an appeal being lodged, parties and representatives would be informed of the listing for the suitability review. This was preferable to leaving open a wider discretion over the listing of the suitability review, since that would introduce delay while a decision was made.

82. There was also limited benefit to full flexibility since, in practice, the overall timescales involved meant that any suitability review would necessarily occur within a limited time window. It could not, in practice, be listed too quickly, since neither the parties nor the Tribunal would be ready. Nor could it be listed too late since this would interfere with the substantive hearing.

83. The TPC therefore concluded that the appropriate formulation of a rule was to require that the suitability review occur no later than a particular date. Most reviews would then be listed, automatically, on that date. The 'No later than' formulation would, however, allow reviews to be listed somewhat earlier in appropriate cases. The TPC had in mind that there might be occasions where an unusually large number of appeals were received on a particular day, causing practical problems in listing a large number of suitability reviews. Further, there would be occasions where an earlier suitability review was desirable and a 'No later than' formulation made it clear that the Tribunal had the power to list a suitability review on an earlier date if appropriate.

84. The 'No later than' formulation would also allow these to be made administratively, rather than requiring a judicial decision to shorten time from 16 working days.

85. In considering the appropriate timing of the suitability review, the TPC accepted that there were benefits to having the review earlier than 16 working days, as suggested by the majority of respondents who addressed this question. Ultimately, however, the TPC concluded that 16 working days was the most appropriate timing.

86. The most important objective of the suitability review was to ensure that an unsuitable appeal was not determined under the accelerated process, rather than removing unsuitable appeals as quickly as possible (although this was an important secondary objective). The TPC concluded that this meant it was important to allow time for the issues in the case to crystalise and for there to be adequate time for parties to prepare for the suitability review. This was particularly important in appeals involving litigants in person.

87. Further, where a case was not suitable for the accelerated detained process and this was apparent at an early stage, there were other mechanisms to address this outside a suitability review.

88. Ideally, such a case would not have been certified as suitable for the accelerated process and therefore would never enter it. If a case had been certified, but was unsuitable, an application could be made, either by one party or jointly, to the Tribunal to exercise its transfer power before the suitability review. The TPC anticipated that, unless the cohort of cases certified was small and select, such applications would be common. This would mean that, if unsuitable cases had been certified, many would be transferred prior to the suitability review, particularly when the appellant was represented.

89. Considering all these factors, the TPC concluded that the appropriate timing of the suitability review was no later than 16 working days after an appeal is lodged.

Question 15: If there is to be a suitability review contained in the rules, to what extent should the rules require it to take place at a hearing, rather than being considered on the papers? Why?

90. Eight respondents suggested that there should be an oral suitability review hearing. Five of these respondents, however, indicated that there should be the option for the review to proceed on paper, with the consent of the parties. All eight respondents argued that an oral hearing would, in general, provide the best opportunity for the Tribunal to assess a case fully, particularly where an appellant was unrepresented.

91. One respondent said that the form of the hearing should be a matter for judicial decision.

92. The TPC agreed that an oral hearing would generally provide the best opportunity to assess the suitability of any individual case for the accelerated process. While, in many cases, a paper determination would produce an equivalent result, there was a risk of an important issue or factor being missed, especially where an appellant was unrepresented. Given the importance of ensuring that only suitable cases proceeded through the accelerated process, a right to an oral hearing was an important safeguard.

The TPC agreed, however, that where the parties agreed that a suitability assessment should be decided on paper, that should be an option open to them.

Question 16: Do you have any further comments on the suitability review issue or the drafting of Rule 10?

93. Although none of the respondents made this point explicitly, in reviewing the responses the TPC concluded that the interaction between the Rule requiring a suitability assessment and the Rule allowing for the transfer out of the Accelerated Detained process was not as clear as it had hoped. A number of responses appeared to suggest that an appeal would only ever be removed at a suitability review, despite the transfer out Rule stating explicitly that an order could be made at any time.

94. In order to clarify that the suitability review is only one opportunity to consider exercising the wider transfer out power contained in Rule 15, the TPC decided to add to Rule 10 a further subsection (3) as follows:

    (3) If the Tribunal concludes that justice cannot be done in relation to the appeal within the accelerated detained rules, it may make an order under rule 15(1).

95. Following further consideration of the draft Rules, the TPC concluded that the term 'Suitability Review' had the potential to cause confusion with the review of a decision under Rule 35. To avoid this the TPC concluded that it would be more appropriate for the Rules to refer to a 'Suitability Assessment'.

Question 17: Do you agree with the draft Rule 13? If not, why not?

96. One respondent suggested that the TPC's approach to the draft Rule 13 was incorrect. They argued that s27 NBA could be read as imposing two separate deadlines. If this interpretation was correct, s27 would require rules to secure that the First-tier Tribunal determined an application for permission to appeal within 20 working days of the applicant being given notice of the First-tier's substantive decision. Then, if a further application for permission to appeal was made to the Upper Tribunal, that the Upper Tribunal determine that within 20 working days of the First-tier's decision in relation to permission to appeal.

97. The TPC did not agree with this interpretation of s27. For it to be correct, the words 'the First-tier Tribunal's decision' in s27(3)(c) would have to be interpreted as referring to two entirely separate decisions of the First-tier Tribunal (i.e. its original substantive decision and its subsequent decision on an application for permission to appeal). This dual meaning does not accord with the words used. Further, it would be incongruous, in the context of an accelerated process, for the legislation to provide only 25 working days for the First-tier Tribunal to determine the substantive appeal, while allowing a total of 40 working days to deal with applications for permission to appeal from that decision.

98. The TPC's view is that the plain and obvious meaning of s27(3)(c) is that the Rules must secure that the process of seeking leave to appeal against the First-tier Tribunal's substantive decision is to be completed no more than 20 working days after the applicant has received notice of that decision.

99. Three Respondents suggested that 5 days was not sufficient time for an appellant to prepare an application for permission to appeal. These Respondents pointed to the difficulty in obtaining legal advice or other assistance while in detention.

100. The TPC accepted that appellants would experience difficulty in meeting these short deadlines and considered how this might be mitigated, within the limit of the overall timescale required by s27.

101. The TPC considered having a longer timetable for application for permission to appeal to the First-tier, on the basis that this was likely to involve more work and require more time than a renewal of that application to the Upper Tribunal. The TPC concluded, however, that having two different time limits in this way would risk confusion, particularly for litigants in person. It would mean applications for permission to appeal to the Upper Tribunal would be more likely to be made out of time, creating difficulties for both litigants and the Upper Tribunal.

102. The TPC did, however, conclude that it was desirable to adjust the balance between the parties and the Tribunal, allowing a party more time compared to the Tribunal. Once an application for permission to appeal is in front of a judge, the decision can be made relatively quickly. Most of the time required by the Tribunal is therefore for administrative, rather than judicial action. Both the First-tier and Upper Tribunal are able to expedite their processes to deal with urgent matters. The Upper Tribunal in particular has a well-established system for placing urgent applications before a judge to deal with judicial review matters where removal of the applicant is imminent. The TPC expects that these systems, given appropriate resources, will be sufficient to allow the Tribunals to act swiftly.

103. The TPC concluded that the appropriate balance was to allow parties 7 working days to apply for permission to appeal (both at the First-tier and Upper Tribunal stage), with the First-tier Tribunal and Upper Tribunal each having 3 working days to determine that application.

Question 18 – Accelerated Detained Appeals: Upper Tribunal Rules

<u>Question 18: Do you agree with the proposed changes to the Upper Tribunal Rules? If not, why not?</u>

104. Most respondents who addressed this question supported the proposed changes.

105. A number of respondents noted that the amendments to the Rules meant that the numbering of the Rules was becoming more complex and that this made them harder to understand. The TPC agrees that this creates some difficulty, but in practice the alternatives are also unattractive. Amending the Rules with fresh numbering addresses the issue, but breaks the continuity of the rules. This creates particular problems when seeking to understand previous decisions. Placing new Rules only at the end, avoids the more complex numbering, but means that the Rules are harder to find or to understand in their proper context. The TPC will, however, keep this under review.

Question 19 – Accelerated Detained Appeals: IAC Rules and Upper Tribunal Rules

Question 19: Do you have any other comments on the rules relating to Accelerated Detained Appeals?

106. One respondent suggested that there should be no extension of time granted in favour of the Respondent to an appeal, since it was they who had decided that the appeal was suitable for the accelerated process and could, if they chose, withdraw the certificate or release the appellant if they found themselves unable to comply with accelerated rules.

107. The TPC did not agree that a Rule of this nature was desirable. Rather than an absolute or automatic rule, it was right to allow judges to consider the individual circumstances of a particular appeal. Although, in practice, if the Respondent failed to meet the timetable set out in the Rules it might be necessary to transfer an appeal out of the accelerated process, this would not always be the case. There was no inherent incompatibility between a case being suitable for the accelerated process (and being certified as such) and a short extension of time being required during that accelerated process.

108. In considering the Rules following the consultation, the TPC concluded that the approach the draft Rules had taken to implementing s27(3)(b) and (5) within the Upper Tribunal Rules was unsatisfactory. Since the only step within the Upper Tribunal Rules that is affected by an appeal being an accelerated detained appeal is the timescale for making and determining the application for permission to appeal, the draft Rules focused solely on limiting extensions of time in relation to those deadlines. The draft Rules did not provide an express transfer out power in the same way as was applicable in the First-tier Tribunal.

109. Upon reflection, the TPC concluded that this was unsatisfactory for two reasons. First, although it sought to achieve a similar practical result, it did not fully implement the requirement of s27(5) that the Upper Tribunal be able to transfer a case out of the accelerated process. As discussed above in the context of the First-tier's power to transfer out, the approach set out by the Act should be followed, even if a different formulation of the Rule would achieve a similar practical result.

110. Second, the effect of the draft Rule was to place a greater restriction on the Upper Tribunal than was required by s27(3)(c). This was because it prevented any extension of time at all, unless the circumstances required for a transfer out of the accelerated process were met, i.e. that this was the only way to secure that justice is done in a particular case.

111. In many cases, however, there would be scope for a short extension of time in the Upper Tribunal without infringing the requirement in s27(3)(c) that the Rules secure that the application be determined not later than 20 working days after the date on which the applicant was notified of the First-tier Tribunal's substantive decision. This is because, in many cases, either the application for permission to appeal or the First-tier Tribunal's decision on that application will have been made more quickly than the Rules require. For example, if the application for permission to appeal is made 4 working days after the applicant is notified of the decision (rather than 7) and the First-tier Tribunal refuses the application in 2 working days (rather than 3), 14 working days remain before the 20 working days expire (rather than 10).

112. Given that these short time limits arise from the requirements of the NBA, rather than a decision of the TPC, the TPC concluded that it would not be appropriate for the Rules to go further than the Act required.

113. The TPC had therefore redrafted the Rules relating to the Upper Tribunal, so that they follow a similar approach to those applicable in the First-tier. Rule 22C now deals exclusively with the effect of an appellant no longer being detained. Rule 21 and 22B contain the necessary limitations on the Upper Tribunal's power to extend time without a transfer. Finally, a new Rule 22D contains the power to transfer a case from the accelerated process, if that is the only way to secure justice.

Questions 20 to 22 – Age Assessments: IAC Rules

Question 20: Do you agree with the proposed Rule 24B? If not, why not?

114. With one exception, those respondents who addressed this question agreed with the proposed Rule 24B.

115. One respondent argued that it was unnecessary and would allow applicants bringing age assessments to remain on the public purse. The TPC did not agree. Interim relief was already available through the judicial review process and, in any event, was required by s55(4) NBA).

116. The TPC would therefore have made proposed Rule 24B, for the reasons set out in the consultation.

Question 21: Do you believe that any further rules changes are needed to deal with interim relief applications? If so, what changes and why?

117. Three respondents [Invicta Law / ILPA / Coram Children's Legal Centre] noted that the shift from dealing with age assessments as a judicial review would result in changes to the duty of candour placed on the Respondent to an appeal.

118. The TPC agreed that the shift from judicial review would mean that the duty of candour would not apply to age assessments in the way that it had and this would have implications for the management of these cases. The TPC did not, however, think that this was a matter that should be addressed through a rule. Recreating the duty of candour within the procedural rules would not have been be a satisfactory approach. It would fundamentally change the general approach of the rules to issues of this kind and it was not clear that the TPC had power to introduce such a duty through procedural rules.

119. The TPC expected that this issue would have been addressed by the IAC using its general case management powers. In practice, detailed standard case management orders would probably have been used that would have ensured that parties are under a similar obligation of disclosure.

Question 22: Do you think that there should be an interested party rule in age assessment cases? Why?

120. Seven respondents argued that there should be an interested party rule on the basis that it would facilitate local authorities and the Home Office being involved in an appeal where they could make a useful contribution.

121. One respondent said that there should not be an interested party rule, since local authorities did not wish to be bound by the Tribunal's decisions.

122. The TPC concluded that an interested party rule would have been desirable. There would be practical advantages to allowing local authorities and the Home Office to be an interested party in suitable cases. Further, the TPC concluded that these bodies had a legitimate interest in proceedings, given they would be bound by the ultimate decision. Although not necessary in all cases, in some, being added as an interested party would be an effective mechanism for these bodies remaining informed of the litigation.

Question 23: Credibility and Tribunal Reasons: IAC Rules

Question 23: Do you agree that Rule 29(3A) should be amended as proposed in order to give effect to s8(1A) Asylum and Immigration (Treatment of Claimants etc) Act 2004 and s22 Nationality and Borders Act 2022? If not, why not?

123. The majority of respondents agreed with the proposed amendment.

124. One respondent, while supporting the objective of requiring the Tribunal to give reasons in relation to credibility, argued that the draft amendment placed excessively onerous requirements on the decision maker and would lead to further appeals to the Tribunal. This, however, seemed to be based on a misunderstanding of the proposed Rule, which applies only to the Tribunal.

125. One respondent suggested that the credibility provisions should be extended to age assessments and noted that credibility could be an issue in those cases. The TPC concluded that such an extension would be inappropriate. The proposed Rule 29(3A) relates to the narrow requirement for rules to be made under s8(1A) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. S8 applies only to appeals against asylum and human rights claims. The TPC concluded that extending the proposed rule beyond these narrow limits would risk confusion both as to the application of s8 (which applies only to appeals against asylum and human rights claims) and the Tribunal's general duty to give reasons for its conclusions (including those relating to credibility).

126. In considering the requirements of s22 NBA, the TPC concluded that it would have been necessary to provide an equivalent rule in the Upper Tribunal in relation to expedited and related appeals. The TPC had therefore provided for a revised rule 40(4A) in the UT Rules, drafted in similar terms.

Question 24 – Experts: IAC Rules

Question 24: Do you agree that Rule 14 should be amended to harmonise it with similar rules in other Chambers? If not, why not?

127. With one exception, respondents who answered this question supported the harmonisation of the rule.

128. One respondent suggested that, rather than considering an amendment, the TPC should ask parliament what it intended.

129. A number of respondents made wider comments about the use of experts within the IAC, suggesting that, in practice, it would be difficult to utilise joint experts and / or that the use of joint experts should not preclude individual parties from instructing experts.

130. Having considered these responses, the TPC concluded that it was appropriate to harmonise Rule 14 with similar Rules in other Chambers. This would allow Tribunals to

order the use of joint experts where appropriate, but would neither require an order for joint experts, nor prevent parties seeking to rely on other expert evidence. The practical considerations raised by respondents do not detract from the desirability of there being an express Rule in the IAC, as there has been in other chambers and other courts for many years.

131. At the point at which it became clear that the other rules would not go forward, it was too late for this change to be included in the Tribunal Procedure (Amendment) Rules 2023, which had already been signed by the TPC. It was not proportionate for a separate statutory instrument urgently to be produced to deal only with this minor point. The TPC therefore expects that it will make this rules change at the next available opportunity.

Question 25 – IAC Rules, Upper Tribunal Rules, and generally

Question 25: Do you have any further comments?

132. One respondent suggested that the existence of two separate Tribunals was inefficient and created unnecessary complication / abuse within the immigration system.

133. The Tribunal structure and the respective responsibilities of the First-tier Tribunal and Upper Tribunal have been laid down by parliament, primarily in the TCEA, which was informed by Sir Andrew Leggatt's report on the review of Tribunals. The TPC's powers and responsibilities extend only to the Tribunal Rules and it has no power to alter the structure that parliament has established.

Consultation and keeping the Rules under review

134. For the reasons set out above, the TPC does not expect to take any further action in relation to this consultation at this time.

135. The TPC is grateful to all those who contributed to the Consultation process. The TPC values the contributions from stakeholders to the rules making progress.

136. The TPC's remit includes keeping the Rules under review. Please send any suggestions for further amendments to the Rules to:

TPC Secretariat, Area 5.49, 102 Petty France, London, SW1H 9AJ

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

137. 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:

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

Annex A – List of respondents to Consultation

1. First-tier Tribunal Immigration and Asylum Chamber
2. Invicta Law Ltd
3. Rainbow Migration
4. Helen Bamber Foundation
5. Duncan Lewis Solicitors
6. The Law Society
7. Bail for Immigration Detainees
8. Immigration Law Practitioners' Association
9. Public Law Project
10. Legal Aid Practitioners Group
11. Refugee & Migrant Children's Consortium
12. Asylum Aid
13. Mike Housden
14. Coram Children's Legal Centre
15. Ministry of Justice